Appeal against conviction

[2019]GRC039

IN THE ROYAL COURT OF GUERNSEY

ON APPEAL FROM THE MAGISTRATE'S COURT

Between **ROBERT ANDRE LE BILLON** **Appellant**

-v-

THE LAW OFFICERS OF THE CROWN **Respondent**

Appeal against Conviction imposed by the Magistrate's Court on 18th March 2019

Before: Richard James McMahon Esq., Deputy Bailiff

Hearing dates: 7th and 27th (a.m. only) June 2019

Judgment handed down: 9th July 2019

The Appellant represented himself
Advocate for the Respondent: Advocate J D McVeigh

Cases and materials referred to in the Judgment:-

The Road Traffic (Drink Driving) (Guernsey) Law, 1989
The European Convention on Human Rights
Sheldrake v Director of Public Prosecutions [2003] UKHL 43, [2005] 1 AC 264
The Road Traffic Act 1988
Blackstone's Criminal Practice 2019
Crown Prosecution Service v Thompson [2008] RTR 5 (70)
Law Officers v Collins (1989) 8.GLJ.16
Presland v Law Officers [2007-08] GLR Note 11
Director of Public Prosecutions v Frost [1989] RTR 11
De La Haye v Law Officers (unreported, 25 January 2019)
Guest v Law Officers (unreported, 9 January 2003)
Law Officers v Nicolle (unreported, 22 April 2004)
Law Officers v Wilson (unreported, 28 October 2004)
Archbold, Criminal Pleading, Evidence and Practice (1966 edition)
The Criminal Appeal Act 1968
The Criminal Appeal Act 1907

Introduction

1. On 18 March 2019, the Appellant, Robert Le Billon, was found guilty in the Magistrate's Court of an offence of being in charge of a motor vehicle on a road with his alcohol concentration above the prescribed limit. He was disqualified from driving for one year and fined £700.

2. By a Notice of Appeal dated 26 March 2019, the Appellant now appeals against that conviction. The grounds of appeal specified refer to him having had an unfair trial because the trial Judge neglected to look at the evidence he had brought with him proving that the Prosecution had deliberately withheld evidence from him and that the police officers had lied in their statements. Further, the Magistrate's Court failed to recognise that there had been procedural failings, including the officers failing to speak to the Appellant's witness, a failure on the part of the Court to recognise that the prosecution fabricated evidence and failing to accept the truthfulness of his version of events as supported by the witness he called. During the course of his oral submissions, the Appellant acknowledged that his appeal contains two strands. The first relates to his contention that the Court should have found on the facts that he had made out the defence available under section 2(3) of the Road Traffic (Drink Driving) (Guernsey) Law, 1989, as amended. He conceded that the elements of the offence itself were all satisfied and that his appeal was not directed to any misunderstanding of the law relating to those elements or any perceived incorrect factual conclusions in respect of them. The second strand relates to the combination of the procedural failures he argued had occurred which, in his submission, should have resulted in him not being prosecuted at all or, if prosecuted, should have been taken into account when the Judge assessed whether or not his statutory defence had been established.

The trial proceedings

3. The Appellant's trial took place on 15 March 2019. The Judge reserved her decision over the weekend and gave a full reasoned judgment on 18 March 2019. In doing so, the Judge found the elements of the offence proved, rejected the Appellant's arguments about all the failings in the way he had been dealt with, carefully considered the evidence adduced by him and on his behalf in relation to the statutory defence, but concluded that he had failed to discharge the burden imposed on him meaning there was a finding that the offence as charged was made out. The sentence followed immediately thereafter.

4. The events leading to this conviction can be summarised comparatively briefly. The Vale Earth Fair took place on 26 August 2018. The Appellant had attended in his capacity as one of the volunteers. He was with friends, one of whom was Samantha Carré. To reach the location of this event, the Appellant drove and parked his vehicle in the car park on Castle Road, just opposite the pathway up to Vale Castle. He and Ms Carré went down to this vehicle towards the end of the event. They were observed by two police officers, who subsequently dealt with the Appellant. The reason for going to the car was to enable Ms Carré to change into some dry clothing because it had rained a lot during the event. The Appellant was suspected of having consumed alcohol and so was tested at this location. He produced a positive result and so was arrested and transported back to the police station. The lower of the evidential breath specimens was in the range where an alternative specimen of blood or urine could be offered, which the Appellant chose to take. A blood specimen was taken by Dr McKerrell at 1.50 am on 27 August 2018. When it was analysed, it was found to contain not less than 88 milligrams of alcohol in 100 millilitres of blood. The prescribed limit is 80 milligrams. The Appellant was initially bailed pending that analysis. When he returned to the police station on 23 September 2018, he was interviewed. He was then charged and first appeared before the Magistrate's Court the following day.

5. At the trial, the two police officers who had dealt with the Appellant gave oral evidence. PC Woods and PC Simon both related their duties at the Vale Earth Fair and how they came to be at the foot of the pathway near the car park towards the end of the evening. They had followed the Appellant and Ms Carré towards the car park. It was common ground that the Appellant's vehicle's car alarm had gone off and that the Appellant had not been able to de-activate it immediately. It was also clear that the Appellant had been within the vehicle and

Ms Carré had been in the front passenger seat. The Appellant had the vehicle's key fob, but the key was not in the ignition. It was also common ground that the car park had been full of vehicles. The Appellant produced an aerial photograph to put to these witnesses on which he had marked where his vehicle had been parked, facing the water, with motor cycles parked to its nearside and a larger panel van being parked quite close to its offside, although there was still room to get the driver's door open so as to get in. PC Simon recalled there being another van parked behind the Appellant's car.

6. Neither officer switched on his bodyworn camera. As a result, there was no visual evidence to support what the Appellant stated he had explained to the officers at the scene. Further, neither officer recalled what the Appellant claimed to have said being said. The Appellant had argued before the Magistrate's Court that the footage from any bodyworn camera would have confirmed his view that his vehicle was blocked in and so unable to be extracted from the space in which it was parked until the van behind his vehicle had been moved. It would also have confirmed what was said by him when the police officers were dealing with him at the scene.

7. The Appellant had stated that he had consumed alcohol that evening. He further stated that he did not feel intoxicated. Indeed, later in the custody yard, the Appellant signed an entry in PC Simon's notebook, which recorded him saying: "*I had a couple of Rocquettes over four hours but I've not eaten much. I can taste alcohol in my mouth but I do not feel drunk.*" Once the roadside breath test was administered, he was arrested and transported to the police station. Whilst he was processed through the taking of an evidential breath specimen on the Intoxilyser at around 1.05 am and then offered a replacement blood specimen, resulting in Dr McKerrell being called to attend to take it, the Appellant has complained that the CCTV recordings disclosed to him do not cover the entire time he spent at the police station. Further, he highlighted the time he had spent chatting to PC Woods, in particular, in a room not covered by CCTV but where he believed there would be sounds heard on any CCTV recording. The Appellant accepted the accuracy of the various analyses of the samples he gave.

8. When the Appellant returned to the police station the following month, it came as a surprise to him that he was interviewed. He has criticised the way in which the questions were posed, believing that he did not have the opportunity to set out his version of what happened. He was also critical of the transcript of his interview and had prepared his own version. The transcriber, Maria Bell, was called to give oral evidence. The Judge listened to the recording with the benefit of both versions of the transcript. It was agreed that I should, as part of the appeal hearing, replicate that, and I did so during the adjournment between the two hearing dates.

9. The Appellant gave evidence. He explained what he had to do the day after the Vale Earth Fair to return two bands and their equipment to the ferry. He had parked in the last space available in the car park. Other vehicles had then parked as best they could, including the van behind his vehicle. He related the trip he had made to the vehicle around 9 pm to get a top for Ms Carré, when he had seen the vehicle behind his. As a result he decided he would have a second drink, which he said he would not have done at all had he perceived being able to drive at midnight or 1 am. He further stated that his "*vehicle would not have been easy to remove from the parking space, in my estimation, considering its 37 foot turning circle within 15.6 inches long and six foot, two wide, would have taken at least 15 to 20 … backwards and forwards manoeuvres before I would have achieved an angle suitable at which to get that car out of that space.*" He also stated:

> "*My original intention was to drive that evening. Had my vehicle not have been blocked in, I'd have had one less drink and driven that evening and been well under the limit but, upon finding that my vehicle was blocked in when I went down the first time, I changed my course of action because I had to drive again the following morning early, the intention was only to have one or two more drinks because I needed to be sober to drive safely in the morning.*"

10. The Appellant said that he had explained all this to the officers at the time, although they had been unable to recall any such conversation. When asked when he intended to drive the vehicle after he and Ms Carré had gone to the vehicle for her to get changed, he said:

> "*Well, how long is a piece of string? My intention was not to have any further drinks that evening. I don't know whether we would have stayed at the castle because some do stay at the castle and have a private party, some go to town, some go to house parties. So let's say, for example, the more likely outcome is that we might have all had a bus to town because they are buses that take you directly into town. There was one waiting, in fact, when we went down to get the clothes, to ferry people. That would have resulted in us being in town within the clubs and establishments until 2.00, perhaps 2.30 in the morning, leaving me, had I returned to the vehicle to drive it, had it have been able to be released anyway and not blocked in, perhaps at the earliest feasibly, 3.00 am, by which time I would have eaten food and consumed further soft drinks, something I hadn't done in 27 hours and is very relevant to your metabolic rate. … It's more likely we'd have walked back to hers and then gone back in the morning. … Realistically, the chances are, like I said, is we would have gone to town and actually I probably would not have gone back there before 10.00 or 11.00 in the morning, which was the time I did go back the following day. … But at the absolute worst, 3.00 am.*"

11. Ms Carré gave evidence as a witness for the Appellant. She had been with the Appellant throughout the evening save for when he went to get a hoodie for her. She thought he had only drunk one cider. She had been inside the vehicle in the car park when the police arrived. She considered the car park to be "*jampacked*" with vehicles. The only intention in going to the vehicle had been to get dry clothes for her. She had not been spoken to by the police. Once she got changed, "*We were then going to go back together up to the castle and be with the group of friends that we were with and then we were looking for … our lift home*". She made it clear that they were not going to drive anywhere in the Appellant's vehicle that night. In cross-examination, she was asked how they were going to get home that night and she answered they were going to walk, the Appellant's "*car was going to be left in the car park regardless of how we got home … and we had all intentions of walking back … we were staying together that night, the intentions were to walk home.*" She repeated that she had only seen the Appellant have one cider and that he had been drinking lots of coffee. She further explained, when asked about it by the Judge, that they "*were just going to pop back up to the castle, just to let our friends know that we were going to be leaving early because the Vale Earth Fair was finishing*" and that she had been getting prepared for the walk.

12. When the Appellant was interviewed on 23 September 2018, in answer to a question posed about where he was intending to drive his vehicle, he replied (using his version of the interview transcript, although the Judge had quoted from the official version):

> "*Well, initially I was just gonna get the clothes and go back up. Erm, I would have intended to drive the vehicle in the next hour, but there was a vehicle behind mine blocking it in, so I wasn't going to go anywhere anyway. A large white van, boxy. As a matter of fact, I had to ask, when I went back the following day, because I took the*

bands to the boat. Erm, one of the French bands, I had to go and get someone to move that van, so I could release my car, from where it was parked."

He added, responding to being asked about his intentions to drive at the end of the evening, "*Right at the end and I was probably going to be giving lifts later on in the evening*". He explained that he had been in the Thomas De La Rue before travelling to the event and that he had not had a drink there "*because I was driving on and I was going to have a couple of beers later in the evening and expected to drive later again, so again, I knew not to have too much.*" He further explained: "*It was always the intention to have just a couple of drinks gently and to drive late at the end of the night. Erm, it would have probably been after 1 in the morning I would have thought by the time I would have gotten round to taking anybody anywhere, because the place shuts at 12, we have to then run around, doing a plastic cup pick up … that usually takes about an hour, and that's usually about 1 o'clock then that people, like, leave for other parties or just to go home or the organisers place.*" In relation to the time at which the police spoke to him at the scene, he explained "*I hadn't intended to go at that moment, but I was intending later in the evening … I mean ultimately I'm telling you that later on I was going to drive the car, yes, but at the time you've stopped me and the time that these samples were taken, no. Because well I couldn't have done it anyway, because it was blocked in, which I'm sure you guys were well aware of, you can remember the scene and where that van was, and there was no way I was getting that 7 seat, 4 metres car out of that gap, no chance.*" His final explanation as to why he was over the limit was:

"*I can only assume, like I said because I hadn't eaten in 27 hours and as you can see I'm not a particularly large person, that a couple of pints was obviously enough. I mean I think Rocquettes, if you think about it at 2 units a pint anyway, which is 4, which is 3-4 dependent on a man's size I suppose. So, by your thing there, I may have been 8 over cause I'm not very much obviously, so I'm not lying to you. It's not like I was pissed and trying to drive my vehicle. I honestly was, obviously, slightly miscalculated, slightly, the limit but I mean, had I got the car out an hour and a half later, would my blood levels have dropped below 88 to the 80? I feel they would have. I felt fine at the time and plus an hour's time from then, I, I felt I probably would have been even more ok, so. I mean it's just, on my part, I've made an error in judgement and gone down to the car and you guys have come in there early, erm, and picked me up with a slight little bit more alcohol in my system.*"

The statutory defence

13. Although the Appellant raised both before the Magistrate's Court and this Court many arguments that he had not been dealt with fairly, the heart of this case turns on whether or not the statutory defence should have resulted in his acquittal. Section 2(3) of the 1989 Law provides that:

> "*It is a defence for a person charged with an offence under subsection (2)(b) above to prove that at the time he is alleged to have committed the offence the circumstances were such that there was no likelihood of his driving the vehicle whilst the proportion of alcohol in his breath, blood or urine remained likely to exceed the prescribed limit; but in determining whether there was such a likelihood the court may disregard any injury to him and any damage to the vehicle.*"

14. Having cited that subsection, the Judge referred to the two cases to which her attention had been drawn by Advocate McVeigh. The first was a decision of the House of Lords confirming that the imposition of a legal burden on the balance of probabilities did not offend against the presumptions of innocence enshrined in the European Convention on Human

Rights. This was *Sheldrake v Director of Public Prosecutions* [2003] UKHL 43, [2005] 1 AC 264. At para. 41, Lord Bingham of Cornhill stated:

> "*I do not regard the burden placed on the defendant as beyond reasonable limits or in any way arbitrary. It is not objectionable to criminalise a defendant's conduct in these circumstances without requiring a prosecutor to prove criminal intent. The defendant has a full opportunity to show that there was no likelihood of his driving, a matter so closely conditioned by his own knowledge and state of mind at the material time as to make it much more appropriate for him to prove on the balance of probabilities that he would not have been likely to drive than for the prosecutor to prove, beyond reasonable doubt, that he would. I do not think that imposition of a legal burden went beyond what was necessary. If a driver tries and fails to establish a defence under section 5(2), I would not regard the resulting conviction as unfair*".

The rationale for this statutory defence was explained in the preceding paragraph:

> "*If [the defendant] can show that there was no likelihood of his driving while unfit, he is deemed not to have been in charge for purposes of section 4 of the 1988 Act and has a defence under section 5(2). There appears to be no very good reason (other than history) for the adoption of these different legislative techniques, but the outcome is effectively the same. The defendant can exonerate himself if he can show that the risk which led to the creation of the offence did not in his case exist. If he fails to establish this ground of exoneration, a possibility (but not a probability) would remain that he would not have been likely to drive. But he would fall squarely within the class of those whose conduct Parliament has, since 1930, legislated to criminalise. In DPP v Watkins [1989] QB 821 it was recognised, in my view rightly, that the offence does not require proof that a defendant is likely to drive: see pp 829D, 832E, 833A. This is not in my view an oppressive outcome, since a person in charge of a car when unfit to drive it may properly be expected to divest himself of the power to do so (as by giving the keys to someone else) or put it out of his power to do so (as by going well away).*"

15. The position in England and Wales can, in my view, properly be translated into Guernsey, where the legislature has decided to follow the approach now found in the Road Traffic Act 1988, as amended. Accordingly, the summary set out at para. 5.51 of *Blackstone's Criminal Practice 2019*, to which reference was also made in the Magistrate's Court, can be adopted as an accurate description of the approach to s. 2(3) of the 1989 Law:

> "*It is not sufficient for the defendant to prove that he did not intend to drive. The question is whether he has shown that there is no likelihood of driving while still over the prescribed limit (CPS v Thompson [2008] RTR 5 (70)); 'likelihood' means real risk (Sheldrake v DPP [2004] QB 487). In Drake v DPP [1994] RTR 411, the Divisional Court held that the presence of a wheel clamp on a motor vehicle could not be disregarded when considering the likelihood of the defendant driving. Medical or other expert evidence will almost inevitably be required to establish the probable alcohol level at the time at which the defendant will next drive (DPP v Frost [1989] RTR 11), unless the length of time involved makes that conclusion obvious.*"

16. The Judge dealt with *Crown Prosecution Service v Thompson* [2008] RTR 5 (70) at para. 6 of her judgment as follows:

> "*In that case, in various circumstances, the police came across the defendant who was asleep in a van and in that case the justices accepted that the defendant had no intention of driving the vehicle either at the time he entered the vehicle or at the time*

he was awoken by the police officers. But that was held not to be the correct approach. The burden of proof was on the defendant to prove the statutory defence on the balance of probabilities. The question to be addressed was whether the defendant had shown that there was no likelihood of his driving the vehicle whilst the alcohol in his body remained likely to be above the prescribed limit. The justices were wrong to focus on the defendant's intention at the time he entered the vehicle or at the time he was awoken by the police officers. The defendant's subjective intention could not be decisive in circumstances where he was affected by drink, in that case well above the prescribed limit, intended to drive when he felt all right and had no way of knowing when he would be below the prescribed limit and he had put forward no scientific evidence to indicate when that point might be achieved."

It is, therefore, quite apparent that the Magistrate's Court had the relevant legal principles relating to the statutory defence firmly in mind.

Applications to adduce further evidence

17. Before I turn to deal with the Appellant's appeal as it relates to the statutory defence, it is convenient here to refer to a number of applications that were made by him during the course of the hearing seeking to adduce further evidence. One example relates to some scientific evidence.

18. This issue had been touched upon as an issue during the course of the trial before the Magistrate's Court. The Appellant mentioned during evidence that he had information that he had been given by a medical professional about the dissipation of alcohol. This was in response to a question from the Judge as to how she could know whether at 3 am the Appellant would have been below the prescribed limit. It was left open because the material the Appellant had with him had not been agreed by the prosecution and there was then no application from the Appellant to adduce this material. The Appellant, therefore, sought to make good this omission by applying to adduce it on this appeal.

19. I rejected this application for two reasons. The first was that the material was not in a form in which it could be received as admissible evidence. For example, it had not been put into the form of an expert report. However, in any event, this application, as well as other applications he made, did not satisfy the test that had been established by the Court of Appeal, and which, in my judgment, is equally applicable on an appeal from the Magistrate's Court to this Court, in *Law Officers v Collins* (1989) 8.GLJ.16, as confirmed in *Presland v Law Officers* [2007-08] GLR Note 11:

> "*To be admissible on appeal, relevant evidence must not have been available at the trial, a reasonable explanation should be given for not having called it there, it should be credible and be capable of raising a reasonable doubt in the minds of the [arbiters of fact] when taken with the existing evidence.*"

20. The Appellant had to concede that he had with him at the trial the material that he subsequently sought to adduce relating to the dissipation of alcohol. Bearing in mind the explanation given in *Director of Public Prosecutions v Frost* [1989] RTR 11 about the potential need for scientific evidence, this could have been a relevant matter for the Appellant to want to lead evidence. However, as will become clear when I deal with the substance of the statutory defence, this only becomes an issue if his suggestion of next driving at around 3 am the following morning is a consideration. If he would have driven at any time up to when the blood sample was taken, the analysis of that sample demonstrates that he was still above the prescribed limit. Had he not driven until the following morning, at 10 am or thereabouts, then the lapse of time was clearly sufficient for the alcohol level to have dropped below the

prescribed limit. That is something about which a lay person would feel confident, without the assistance of expert medical or scientific evidence, on which to reach a conclusion. Further, it should, in my view, be borne in mind that a professional judge is more likely than lay justices to have greater experience of dissipation rates and, even without expert evidence, reach a confident conclusion as to when, having been analysed at 88 milligrams of alcohol in 100 millilitres of blood, the person is likely to have dropped below the prescribed limit of 80 milligrams. However, the more precise the time of next driving becomes, the harder this assessment inevitably becomes. By way of example, if 3 am were the time in issue, as was suggested in the Appellant's evidence, then a further lapse of 70 minutes would, on a balance of probabilities, potentially be long enough to conclude that the alcohol level would have dropped sufficiently. However, if it were 2.30 am that were being considered, that 40 minute lapse may well not be long enough. However, for the reasons that follow, the real choices of times of driving were between earlier than 1.50 am and much later that day, probably around 10 am, by which time scientific evidence would not have been required.

21. Another instance where the Appellant applied to adduce further evidence on appeal concerned a video he had produced of the position of a car in the car park in an attempt to replicate where his vehicle had been parked when he attended the Vale Earth Fair and how difficult it had been to get a smaller vehicle than the one he had been using out of a space with vehicles around it. In making the application, the Appellant acknowledged that he should have realised at the time that photographs of the positioning of the vehicles would have assisted, or a scaled plan, as opposed to the aerial photograph he had used at the trial, with vehicles marked on it and that he was seeking to rectify his lack of understanding as to what was required of him to prove his point. He also relied on the fact that he had understood at the time that there would be video footage from the police officers' bodyworn cameras that would have demonstrated the relative positions of the vehicles. That application was rejected because the evidence that the Appellant sought to adduce on appeal could have been made available at the trial. It was not something new that had only come to light subsequently.

22. One final area where the Appellant applied to have disclosure and then for the material to be admitted at the appeal hearing related to the CCTV from the police station that had not been provided to him previously. On the basis that the Appellant wished to review that CCTV footage, and also any sound heard whilst he was off camera that might have supported his assertion that he had been discussing his driving options with PC Woods whilst waiting for the doctor to attend, I would have been prepared to grant that application and, had there been material on that CCTV supporting his claims, I would have been minded to allow his application for that fresh evidence to be adduced on the basis that it was not available at the time of the trial and that it could have affected the factual findings made. However, Advocate McVeigh had made enquiries and such CCTV footage is deleted after three months, so it was no longer available. In those circumstances, I was unable to make any order that would assist the Appellant but, as I will explain later, I have attempted to factor in how this might have affected matters at trial.

Appeals against factual findings

23. The Appellant did not argue that the approach to which Advocate McVeigh referred, citing a decision of this Court earlier this year, *De La Haye v Law Officers* (unreported, 25 January 2019) was wrong. Accordingly, the principles set out therein apply to the findings made in relation to the statutory defence.

24. Where the ground of appeal advanced is that the verdict cannot be supported having regard to the evidence, the way it was put by the Court of Appeal in *Guest v Law Officers* (unreported, 9 January 2003, at para. 12) is a helpful starting point:

"*Usually this Court is considering the verdicts of the Jurats in the Royal Court. Such verdicts are not "speaking" verdicts, and it is not, therefore, possible to discern by what process of reasoning, or lack of it, the Jurats have reached their conclusions. In those circumstances, if the summing up is sound, the Court may well not be able to interfere unless the verdict is obviously wrong. But where, as here, the verdict is one of a legally qualified Magistrate it is a "speaking" verdict because the Magistrate has to state reasons for his verdict in his judgment. In such a case it is possible for this Court to review the Magistrate's process of reasoning, and to consider whether, by that process, the Magistrate has reached a verdict which is "unreasonable", or one which "cannot be supported having regard to the evidence" or whether "on any ground there was a miscarriage of justice".*"

Accordingly, this Court is able to review the process of reasoning in the Magistrate's Court in order to determine if the "*judgment reveals a process of reasoning which is defective, or which cannot support the verdict ... reached*", in which case the Court "*can and should intervene*" (para. 13).

25. In the context of an appeal to this Court from the Magistrate's Court, in *Law Officers v Nicolle* (unreported, 22 April 2004, at para. 63) it was explained that:

> "*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.*"

In similar vein, the test was put as follows in *Law Officers v Wilson* (unreported, 28 October 2004, at para. 31):

> "*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.*"

26. By reference to the 1966 edition of *Archbold, Criminal Pleading, Evidence and Practice*, (the relevance of that edition being that it was published just before the Criminal Appeal Act 1968 repealed the Criminal Appeal Act 1907, in which the ground of appeal that the verdict cannot be supported having regard to the evidence existed), a shortened version of the test is whether the verdict was "*obviously and palpably wrong*". The passage is found in para. 934:

> "*It is not a sufficient ground of appeal to allege that the verdict is against the weight of the evidence. Aladesuru v. R. [1956] A.C. 49; 39 Cr.App.R. 184. Nor is it sufficient merely to show that the case against the appellant was a very weak one: R. v. McNair, 2 Cr.App.R. 2; nor is it enough that the members of the Court of Criminal Appeal feel some doubt as to the correctness of the verdict: R. v. Simpson, 2 Cr.App.R. 129; R. v. Crook, 4 Cr.App.R. 60; R. v. Graham, 4 Cr.App.R. 218; nor that the judge of the court of trial has given a certificate on that ground: R. v. Perfect, 12 Cr.App.R. 273; R. v. Hopkins-Husson, 34 Cr.App.R. 47. The court will set aside a verdict on a question of fact alone only where the verdict was obviously and palpably wrong. R. v. Hancox, 8 Cr.App.R. 198.*"

27. In the present case, suitably modified to recognise that the issue is about evidence relating to the statutory defence that must be viewed against the standard of proof on a balance of probabilities, I recognise along the same lines as in the *De La Haye* appeal, that:

> "*I have the benefit of a reasoned decision in which the Judge outlined the various requirements before she could find the Appellant guilty, with which no issue is taken, outlined the evidence she had heard, and drew conclusions from that evidence in order to reach the verdict of guilty. The focus, therefore, is on the process of reasoning and whether the evidence supports that finding. In reviewing that finding, I am guided by the need for the Appellant to satisfy me that the decision is obviously and palpably wrong. In that regard, I must not attempt to re-try the case on the papers, especially because the Judge has had the benefit of seeing and hearing the witnesses. However, if I am satisfied that the Appellant has shown that the judgment reveals a process that is defective or that the evidence does not support the finding of guilt, this Court can and should intervene and reverse that decision.*"

Discussion

28. One of the arguments advanced by the Appellant has been that the positioning of the vehicles in the car park meant that his vehicle was blocked in. The Judge rejected this contention. It was, however, a factor to bear in mind when determining the likelihood of the Appellant driving. Paragraph 30 of the judgment in the Magistrate's Court found:

> "*I am satisfied that the defendant would not have allowed that vehicle to be an obstacle in his way. I assessed the defendant when he gave evidence as determined, focused and indeed blinkered. … I am satisfied that the way in which that vehicle was parked and the way it has been described to me by both the defendant and the police officer, that that vehicle would not have stopped the defendant that night if he had intended to drive.*"

29. This conclusion, in my judgment, was one that was open to the Judge on the evidence and so it is one with which this Court cannot interfere. There was a difference between the Appellant's evidence and that of PC Simon about the ease with which the vehicle could be extracted as a result of the van parked behind the Appellant's vehicle, as rehearsed in paragraphs 28 and 29. I take the view that the Judge was not simply accepting PC Simon's evidence that manoeuvring the vehicle would be easy. Instead, she has, on my reading of this paragraph, accepted the Appellant's evidence that it was not straightforward to move the vehicle backwards and forwards a number of times to get the angle required to drive the vehicle out from the car park, but she has also made an assessment about the likelihood of the Appellant's determination to attempt this "*if he had intended to drive*". In other words, the relative positions of the vehicles in the car park did not mean that it was impossible for the Appellant to drive the vehicle away, but it was something that would require more effort than if the van had not been parked so close behind his vehicle. Whether or not he would have attempted to do so then became a factor rather than whether or not it was possible to drive the vehicle away being determinative of the likelihood of driving.

30. Although I asked Advocate McVeigh whether the Judge might have concentrated too much on what the Appellant's stated intention had been in relation to when he would next drive, referring to the criticisms made in *CPS v Thompson*, without viewing the test of likelihood more broadly, as required, I am satisfied that in the context of this case, it was the most significant element. The Judge started with a finding that she was not persuaded that the Appellant had been telling the truth when he stated that he had seen the vehicle earlier and "*that it led him to consume more alcohol than he had originally intended*" (para. 31). Once again, this is a finding that this Court cannot now say is unsupported by the evidence. On the

one hand, Ms Carré stated that the Appellant had only consumed one cider, whereas the Appellant stated he had had two pints. Further, in interview, he had sought to explain why he was over the limit as having been a miscalculation. This was, in my view, consistent with his evidence that it had been his intention to have a couple of drinks at the Vale Earth Fair, which is what he did. In those circumstances, it was a conclusion open to the Judge that the second drink he admits consuming that evening was not a direct consequence of him having been to his vehicle earlier that evening. Although para. 31 is a little ambiguous, I am persuaded that the proper meaning of the words is not that the Judge rejected that the Appellant had been to the vehicle earlier that evening, but rather that she rejected his explanation that this is what led to him having a second drink. In other words, he had not changed his intentions of driving later on that evening as a result of his visit to the car park, as he claimed had been the case. Through disbelieving him on this issue, the Appellant's credibility relating to his other claims was, in my view, a matter on which the Judge was entitled to reach the conclusions she did.

31. The evidence on the question of the Appellant's intentions was described by the Judge as consisting of "*His many and different versions of when he may or may not have been driving after the police arrested him*", which she considered were "*not cogent*" (para. 32). When reviewing his evidence, the possibility of driving about one hour after he was dealt with by the police, at the earliest at 3 am or the following morning at 10 or 11 am were all raised. In para. 27, the Judge found as follows:

> "*I concluded that I had received a number of different explanations from the defendant when he next intended to drive, both from what he told the police and from what he told me. There are different explanations in the papers that he has said and accepted that he said. There are different explanations that he gave me. He said that he would drive an hour later after the police came upon him or at the earliest at 3 am and because of the van blocking him in, it would have been 10 am or 11 am and he said that throughout his intention was always in accordance with his volunteer duties to return to the Vale Earth Fair to help but in closing submissions he thought he would probably have done what Miss Carré had told him to do although that had not been his original intention.*"

32. The judgment records the evidence of Ms Carré in para. 25:

> "*I received evidence from Samantha Carré. She gave similar evidence to the defendant. There had not been any intention formed between them, or mentioned perhaps more likely, that the defendant would drive and that at the point when they went to the vehicle just before 12 midnight that she had said that their intention as far as she was aware was to go home either by getting another lift or by transport or by walking. She was certain the defendant was not going to drive that night. That is what she said.*"

The judgment is not, though, explicit as to why Ms Carré's evidence has been rejected. The Judge followed up her finding about not believing the Appellant about having a second drink as a result of seeing the van parked behind his vehicle, which was a finding open to the Magistrate's Court on the evidence, with (at para. 32):

> "*I am satisfied that when the defendant gave that evidence it was something that either he had thought about in advance of himself giving evidence or he had thought it up on the spot. I could not assess that the defendant had told me the truth about that and therefore about other matters. I was satisfied that he told me the truth as he very much wished it was, maybe as he had convinced himself so that it had become reality for him but I cannot be satisfied that the defendant has satisfied me that there*

was no likelihood of his driving the vehicle whilst the proportion in his blood remained likely to exceed the prescribed limit."

33. It must follow from that conclusion, that the Judge rejected Ms Carré's evidence about how she and the Appellant would have travelled upon leaving the Vale Earth Fair. If the Judge had accepted Ms Carré's evidence, it follows that there was no likelihood of the Appellant driving until the following morning. I have, therefore, had to consider whether there is a rational basis for that evidence to be rejected in the same manner that the Judge chose to reject the Appellant's explanation about only driving later, rather than effectively making a finding, on the balance of probabilities, that the Appellant would have driven as he explained had been his intention at the end of completing his volunteer duties.

34. Another aspect of the case on which the judgment is silent is any finding as to when the Appellant's blood-alcohol level would have fallen below the prescribed limit. This is perhaps understandable where no scientific evidence was adduced on the question, but, as I have already noted, it becomes a factor if there could potentially have been a finding that the likelihood of next driving was at around 3 am, as suggested by the Appellant. Section 5(2) of the 1989 Law contains the so-called statutory assumption: "*it shall be assumed that the proportion of alcohol in the accused's breath, blood or urine at the time of the alleged offence was not less than in the specimen*". The effect of this is that the specimen on which the Crown relied, being the blood sample taken from the Appellant at 1.50 am the following morning, demonstrates that, when the Appellant was in charge of the vehicle a couple of hours earlier, he was above the prescribed limit. However, in a case like the present one, where the time at which the Appellant was next to drive determines whether he has committed the offence or not, the lapse of time after that specimen was taken becomes relevant if there was a genuine possibility that the time of next driving would be close to the time when the specimen was taken, so that the likelihood of still being above the prescribed limit at that time becomes highly significant.

35. This only becomes an issue, however, if there was proper evidence on which to reach a conclusion that the Appellant might next have driven at around 3 am, as he suggested. Having carefully considered all the evidence given, it strikes me that this time has been referred to by the Appellant on the basis that he thinks it is approximately the earliest time at which someone could safely work out that the small amount he was above the prescribed limit at 1.50 am had dropped to below the prescribed limit of 80 milligrams. The oddity, though, is that, apart from a theoretical assessment of the Appellant and Ms Carré having been somewhere else before returning to his vehicle at around that time, there was no basis on which that was the time at which he would next have driven. In other words, although this was not spelt out in the judgment, the notional driving time of 3 am was clearly capable of being rejected because there was nothing aside from theory pointing towards that being the time when the Appellant would next have driven. Instead, the choices were between him not driving after the event finished but returning to his vehicle only the next morning and him actually driving, as he had stated he had intended to, at some point by around 1 am.

36. The choice between those two possibilities, one of which results in a conviction and the other in an acquittal, was something the Judge was best placed to assess, particularly having seen the witnesses. It is clear that her assessment of the Appellant was that she disbelieved his explanations about why he had explained throughout his police interview that he had the intention of driving once he had completed his volunteer duties. The Judge found that the Appellant would, if so minded, have manoeuvred his vehicle out of the parking space. There had apparently been no discussion between him and Ms Carré about how they would get home. It appeared to come as a surprise to him during Ms Carré's evidence that she was adamant they would have walked. That surprise may have been an act or it may have

reinforced the impression that there was no plan between the pair leaving the Judge to concentrate on what was going through the Appellant's mind that evening. In doing so, the Judge must have concluded that Ms Carré's evidence, supportive as it was of the Appellant's case, was similarly based on what the Appellant wanted her to say and so was not credible as an accurate recollection of what actually took place. Because the Appellant had told the police that he had felt fine, the Judge had evidence from which to decide that, in all likelihood, he would have driven somewhere when they eventually came to leave the venue.

37. I do, however, recognise that the totality of the evidence heard at the trial was capable of leading to the conclusion that the Appellant had made out the statutory defence. A different judge could have preferred the evidence of Ms Carré that the pair would not have returned to her flat in the Appellant's vehicle and that he would, as a result not have driven until the following morning. The Appellant referred to a number of newspaper reports of other cases in which the statutory defence had been accepted. Although I believe he did so to show that there are others who have benefited from such a finding, the effect is that it shows how fact-specific such cases always are. However, in his case, the Judge chose not to accept that as being established on a balance of probabilities and instead concluded that there remained a likelihood that the Appellant was going to drive whilst still above the prescribed limit. That could have been at any time prior to shortly after 1.50 am. There was evidence on which that likelihood can be said to be founded because on more than one occasion the Appellant referred to driving once the event had finished. Accordingly, although the evidence adduced could have led to either outcome, it is not the function of this Court to substitute its own decision by re-trying the matter on the papers, but rather to assess whether the conclusion reached was obviously and palpably wrong. As a result, although it would have assisted if the findings on this question had been more explicit than they were, I am satisfied that the decision reached by the Judge to reject the statutory defence was one open to her.

Procedural failings

38. The Appellant's written and oral submissions contain many examples of what he claims has gone wrong with how he has been dealt with. Some of them are so wild and unsubstantiated that all I have done is to ignore them. It would be inappropriate to attempt to respond to each and every one of those allegations and I have, therefore, confined my consideration to what can legitimately be advanced on this appeal. For example, there are repeated accusations of corruption, whether that is within the police, the prosecution or the court. I simply do not accept that there has been any concerted effort to ensure that the Appellant was to be convicted of this offence. Such intemperate accusations really do not assist the Appellant's case, however badly he feels he has been treated. If he were to take a step back from what has happened for a moment and realise that the starting point is that he was in charge of his vehicle at a time when it was on a road and he was above the prescribed limit, he ought to realise that what transpired flowed from his decision to go to his vehicle at that time. There were failings in the process, but they have to be placed into their proper context. It would only be if the Court considered that those failings led to the exclusion of evidence against him or meant that the entire process would render any conviction unsafe that they would have merit.

39. It is relevant at the outset to remember that the Magistrate's Court acknowledged that there had been errors. For example, at para. 14 of the judgment, reference is made to the mistake the officers made in not activating their bodyworn cameras, to the differences in punctuation and certain words in the interview transcript, and to the fact that the police did not speak with Ms Carré at the scene or shortly thereafter to take a statement from her. The Appellant has been highly critical about the way in which the CCTV from the police station was provided to him late and then was incomplete. As far as the Appellant is concerned, all of these add up to

a desire on the part of the police and prosecution to see him wrongly convicted. In my view, these concerns are without foundation.

40. It is important to consider what the outcome would have been had everything happened as the Appellant suggests it should have happened. If the bodyworn cameras had been activated, the position of the vehicles respective to one another may have been clearer than they were from the evidence. However, it was not the Appellant's case that his vehicle could not be manoeuvred out of its parking space but rather than it was difficult. That was the basis on which the Judge approached that issue and on which she reached a conclusion based on her impression of the Appellant as a witness. Those cameras would have recorded the conversation between the officers and the Appellant. This may, as the Appellant stated, have included him offering an explanation as to why they were at the vehicle at that time and what would happen thereafter. However, when the police officers were cross-examined by the Appellant, he did not suggest to them anything further than him explaining that he had done nothing wrong and that all he had done was to enter his vehicle. This is different from going further and explaining that the vehicle would be left at that location for many hours. It seems that the Appellant's focus at the time was on why he was being spoken to when he was not about to drive rather than anything else. That was also his approach when explaining this aspect of his appeal. He felt that just going to a vehicle in the way he did should not result in police action.

41. This is one of the aspects of the development of the "in charge" offence in England and Wales on which Lord Bingham was commenting in the ***Sheldrake*** case. Because the mischief of the offence is to prevent drink-driving, where a person is only involved in something preparatory, such as being in charge, the key question becomes whether there would thereafter be an offence of drink-driving. Being in charge is comparatively easily shown in circumstances such as these where the person with the keys is at the vehicle and is then tested with a positive result. In order to avoid that situation, the Appellant should have considered putting someone else in charge of the vehicle or not being found in its vicinity. His suggestion of having mis-calculated his alcohol-level rather points to why he had not adopted either of those options and why he must thereafter accept the consequences of having been above the prescribed limit at the time he went to his vehicle, when he was clearly in charge of it. Once found in charge like that, the onus of establishing that there was, on the balance of probabilities, no likelihood of driving until some time after the alcohol-level has dropped below the prescribed limit shifts to the defendant. Any explanation given at the time or in the immediate aftermath could be a relevant factor as to whether or not any prosecution follows or should be continued, but it is not necessarily always an end to the matter. Once the elements of the offence can readily be established, as the Appellant acknowledged they could be in his case, whether or not the statutory defence can be made out becomes a question for trial, where the explanation offered by the person in charge of the vehicle as to his intentions is just one factor to take into account.

42. What this means is that the absence of any footage from the bodyworn cameras has no impact on whether the prosecution could prove the required elements of the offence. They were effectively conceded by the Appellant. This was not, therefore, a case in which some evidence necessary to prove guilt fell to be excluded. At best, the absence of any footage affects the way in which the Appellant could advance his statutory defence. However, I was not persuaded that this error on the part of the officers meant that the Appellant was deprived of something compelling that would have affected the Judge's assessment of the Appellant's overall evidence. It seems that he was not suggesting that there would have been any explanation other than that he was not intending immediately to drive recorded on any such footage. Accordingly, I do not consider that the error of the officers over their bodyworn cameras means that the Appellant's conviction is unsafe.

43. Similarly, in relation to the missing CCTV footage, as shown by the exchanges of correspondence pre-trial to which the Appellant referred, the reason advanced by the Appellant when requesting its disclosure was that it would show that he was not drunk. However, that was not the issue in this case. What mattered was the analysis of the blood specimen taken at the police station at 1.50 am. This proved that, at the time of the offence, the Appellant was above the prescribed limit. This was not a case in which he was being dealt with for being unfit. Indeed, the Appellant confirmed that he had seen the reading when he gave the roadside breath test and that when he provided his evidential specimens they were both in the 40s, which is why the alternative blood sample was offered. Looked at in the round, these readings are consistent with a downward trajectory through alcohol being dissipated with time. Of more importance is the contention that there may have been recordings of conversations the Appellant was having that would support his later assertion that he would not have driven until the following morning. Again, though, the Appellant did not suggest that he mentioned the likelihood of leaving the vehicle where it had been parked overnight in the same fashion that he did at trial. There remains the question as to whether what he and PC Woods discussed would even have been captured on the recording. In any event, the Appellant did not put to PC Woods in cross-examination what it is that he says they talked about during the relevant times. Accordingly, I am not persuaded that the Appellant has been prevented from having a fair trial by reason of the unavailability of the missing CCTV footage.

44. The final matter on which I will comment expressly is the Appellant's complaint that Ms Carré was not spoken to by the officers or subsequently. This was couched in terms that it meant her memory would have faded over the months, which is why the Appellant suggested she write some notes by December 2018, well in advance of the eventual trial in March 2019. In my view, that in itself takes the Appellant no further forward. Ms Carré attended the trial and gave the evidence as recorded in para. 25 of the judgment. The fact that it appears that the Judge chose to reject that evidence is unaffected by whether the police officers should have spoken with her at the time.

45. Perhaps of more significance is the question whether, if Ms Carré had been asked about what they were doing at the vehicle at shortly before midnight on that day is whether she would have said anything about her intention to walk home, as she mentioned so clearly as part of her evidence. In my view, this is quite finely balanced. I imagine that she would have confirmed, had she been asked, that the Appellant was not about to start driving at the point when they were found by the police at the car. It appears to have been accepted that she was getting changed into dry clothes before they would return to the Vale Earth Fair site. Thereafter, what would have happened seems to me to have been open to what others were doing, most particularly the Appellant. If he had, as envisaged, done those aspects of his volunteer duties, including picking up plastic cups, it seems that they would then have had to work out how to travel to where they were going. Although it is no more than speculation, I do not consider that Ms Carré, had she been spoken to, would have been adamant that she was planning to walk home. Although the Judge did not deal with how she treated this evidence explicitly, it appears that she regarded the assertion of walking home in a similar manner to the Appellant's own evidence, ie, something that Ms Carré had convinced herself of rather than being founded in any recollection of what was the position on the night. Indeed, it is possible that neither had really formulated a finalised plan of how they would proceed after returning to the venue but the Appellant's assertions at the time that he was not drunk and that he had apparently miscalculated how much he had had could well support the finding that he would have driven his vehicle once he had, with some difficulty, extracted it. Accordingly, I am not persuaded that any failure to speak with Ms Carré at the time has resulted in the evidence coming out any differently from as it eventually did and being dealt with in the same manner as it has been.

46. In summary, therefore, I have carefully considered what I regard as the valid points that the Appellant can properly make, and in doing so I have disregarded all his wilder accusations, and addressed whether or not he has been dealt with fairly. I have concluded, consistently with the way it was assessed in the Magistrate's Court, that it is unfortunate that there have been slips, but that they do not affect the overall assessment of the evidence against the Appellant or the findings made in relation to the statutory defence. In particular, a finding needed to be made as to the time at which it was likely the Appellant would next drive. The procedural failings to which the Appellant has referred do not, in my view, impinge directly on that question. There may have been something said by him or Ms Carré on the night in question, but it would not have been precisely directed at that question because this was not the way in which the Appellant put his case at trial. In those circumstances, the overall process has not rendered unsafe the conviction that followed.

Conclusion

47. For the reasons I have given, the Appellant's appeal is dismissed. The principal argument he advanced was that the rejection of the statutory defence was not supported by the evidence. However, although a different outcome could have arisen before a different judge, I have concluded that there was evidence on which it was open to the Judge to reach the conclusion she did. The Appellant has failed to demonstrate that the decision to convict was obviously and palpably wrong. Further, once the core of the Appellant's complaints about alleged procedural failings are taken into account, having first disregarded his more extreme and unwarranted allegations, I do not find that the conviction is unsafe.

48. The Appellant indicated that he wished to pursue his appeal against sentence in the event that his conviction were to be upheld. He made some submissions on that basis, but his appeal against sentence, if it is to be pursued, involves the Court sitting with Jurats. Accordingly, if, in the light of this judgment, the Appellant wants to argue that his sentence is manifestly excessive (or wrong in principle, although it is unclear how he would present such an argument), then he should liaise with the Greffe to fix a date for his appeal against sentence to be heard. If he does not do so within the next 14 days, his appeal against sentence will be treated as having been abandoned.