Appeal against conviction in the Magistrate's Court, for dangerous driving contrary to section 10(1) of the Road Traffic (Guernsey) Ordinance, 2019. Appeal dismissed.

[2024]GRC005

IN THE ROYAL COURT OF GUERNSEY

APPEAL AGAINST CONVICTION

Between:

LEE JAMES LUSCOMBE **Appellant**

-v-

THE LAW OFFICERS OF THE CROWN **Respondents**

Appeal against Conviction heard on: 18th January 2024

Judgment handed down: 22nd January 2024

Before: Lieutenant Bailiff, Graeme D McKerrell

The Appellant appeared in Person
Counsel for the Respondents: Crown Advocate F M Russell

Cases and materials referred to in Judgment:

Law Officers of the Crown v Ogier and Le Noury (1989) 7GLJ 17
Law Officers v Guest (Guernsey Judgment 8/2003)
Birnie v Law Officers (Guernsey Judgment 41/2016)
Glen Nicolle v Law Officers (Guernsey Judgment 20/2004)
Simon v Law Officers Royal Court decision 23 July 1999
R v Sussex Justices ex parte McCarthy [1924] 1KB 256
Taylor v Law Officers (Guernsey Judgment 13/2011)
Castle Company Management LLC Limited v GFSC (Guernsey Judgment 63/2004)
Law Officers v Collins (1989) 8 GLJ 8

Introduction

1. At the conclusion of the hearing on 18th January 2024, I dismissed this appeal and said that I would hand down written reasons in due course. This I do now.

2. On 13th October 2023, the Appellant ("A") was convicted of the offence of driving a motor vehicle in a manner dangerous to the public, contrary to section 10(1) of the Road Traffic (Guernsey) Ordinance, 2019, as amended. More specifically, the allegation was he had ridden

a motorcycle along Fort Road during the early evening of 19th April 2023 at a speed of 75mph, that section of road being governed by a 35mph limit. A not guilty plea had been entered and he was convicted after a full trial. The Crown was represented by Crown Advocate Russell, who also appears in this court. At trial A represented himself, as he does in this appeal, and has done so very ably and in a respectful manner.

3. In the court below there was a mixture of live testimony and agreed written evidence as well as some body worn camera footage. In finding A guilty, the judge gave detailed reasons for his decision, which explained clearly and fully the route to verdict he had taken. A now seeks to have that conviction set aside and has submitted a helpful skeleton argument, albeit that the use of the word "skeleton" does the detail of it a very great disservice. Similarly, the Respondent has provided a written submission in reply in which they helpfully set out the four grounds on which they consider A relies in support of his appeal and which I adopt for the purposes of this judgment. They principally relate to what A submits is a lack of evidence and a failure to follow proper operating procedures when using the ProLaser speed device. That having been said, A also contends that on the facts the manner of his driving did not constitute "dangerous" driving.

Applicable legal principles

4. It has long been the case in Guernsey that this court follows the provisions of section 25 of the Court of Appeal (Guernsey) Law, 1961, with the effect that an appeal against conviction can only be allowed in circumstances where:

    a. The decision below was unreasonable or cannot be supported having regard to the evidence; or
    b. The decision should be set aside on the ground of a wrong decision on a question of law; or
    c. There was a miscarriage of justice.

5. With regard to (a) the test to be applied is whether the verdict was "obviously and palpably wrong". The English test of "unsafe or unsatisfactory" is not applicable in Guernsey – see Law Officers of the Crown v Ogier and Le Noury (1989) 7GLJ 17, Law Officers v Guest (Guernsey Judgment 8/2003) and Birnie v Law Officers (Guernsey Judgment 41/2016. This means in practice that where the trial judge has seen the witnesses, and considered their evidence in the light of all the other evidence, the decision of the court is only likely to be over-turned if it was perverse or one that no reasonable tribunal could have made. As such, provided the judge has properly directed himself on the burden and standard of proof and given himself proper directions on the law, then unless there was no evidence to support the judge's findings, or his findings were so perverse that no reasonable judge could have made them, it will usually not be for this court to interfere with the decision below – see Glen Nicolle v Law Officers (Guernsey Judgment 20/2004).

6. With regard to what, in Guernsey, is meant by "dangerous" driving, the test to be applied is that set out in the case of Simon v Law Officers, a decision of the Royal Court dated 23 July 1999.

7. Although the test in Simon is not specifically mentioned by the learned judge in this case I am satisfied he will have been aware of the test to be applied. However, given that it was not spelt out in his decision it means the approach I have taken is to satisfy myself on the facts as found by him that it was not unreasonable to have come to the conclusion that the manner of driving was dangerous.

Discussion

8. As indicated earlier, A's appeal rests on four main grounds. There is, however, a degree of overlap between them. One such issue is what might be referred to as an oblique suggestion by A that the judge was biased and, if not, was certainly too quick to accept the evidence of police officers because they were police officers. If bias is a ground of appeal then it must be specifically pleaded. This is because it is a very serious allegation to make. Any suggestion of bias strikes at the heart of any criminal justice system, where independence and objectivity must prevail. A judge will have taken an oath of office at the time of taking up appointment, which if not observed would undermine the fair and proper administration of criminal justice.

9. As I have said, A does not appear to go as far as to suggest a hostile bias on the part of the judge but submits instead that to an observer it would have appeared he was not completely impartial. In his written submission, A invited me to read the transcript of the proceedings below. That, of course, is something I have done.

10. There is nothing in the transcript, to my mind, that gives rise to any suggestion of bias, whether conscious or unconscious. The test, however, is not what I think but what an independent observer would make of it and in this context that person is assumed to be imbued with a reasonable understanding of how the criminal justice system works and of the matters in issue. So whilst A is correct to make reference to the famous words of Hewart LCJ in R v Sussex Justices ex parte McCarthy [1924] 1KB 256 they have to be read in the context I have just given. In my view, there is nothing within the transcript that could properly give rise in the mind of any reasonable observer to any proper suggestion of bias or that the trial, in either its form or timing (or both), was unfair or in any other way in breach of Article 6 of the ECHR.

11. It seems clear to me that by his questions, in particular of PC Potter, the judge went to some lengths, in light of A not being represented, to ensure the case for the defence was put properly (and fairly) by asking questions that might otherwise be expected to have been raised by an Advocate.

12. With regard to any suggestion by A the selection of the trial date was not accidental and may have been manipulated, I refer to the case of Castle Company Management LLC Limited v GFSC Guernsey Judgment 63/2004 in which the Court of Appeal gave guidance generally about how unsubstantiated assertions of bias or improper conduct are to be treated. In short, it is one thing to raise an allegation but quite another to be able to rely upon it unless supported by solid evidence. In this case there is no such evidence.

13. The first main ground of appeal put forward by A, therefore, is that the judge came to a wrong decision on the facts. This ground is however based on the facts as A believes them to be and not necessarily as the judge found them. With that in mind, I have already indicated the basis upon which I must approach this appeal and the limitations this court faces in setting aside findings made in the court below. It is clear that throughout the trial and in this appeal, A has sought to place reliance on what he regards as a deficiency of evidence due to proper procedures not having been followed. This, coupled with a misunderstanding of what evidence is, and what is required to prove a case, has led A to believe that an absence of certain things (such as the strict adherence to manufacturer's guidance) must cause there to be a doubt in the mind of the judge. By this I mean that A has placed heavy reliance throughout upon, amongst other things, matters such as: (i) PC Potter not producing evidence of the initial tests he performed at the start of his shift before going out with the ProLaser device and (ii) not having taken a photograph of the speed he relied upon in court that PC Potter says was displayed on the screen of the device that caused him to he set off in pursuit of A.

14. Taking those two example in turn, PC Potter gave oral evidence that he did conduct the necessary preliminary tests. Whilst it is true he did not apparently make a precise note of what he did exactly, and with what specific results, he nevertheless did make a note in his pocketbook that all the normal preliminary tests had been conducted satisfactorily. That being

his evidence, it was then for the judge, having considered it in the light of all the other evidence, to decide whether he accepted it and, if so, what weight to put upon it. There is absolutely nothing to suggest that PC Potter did not tell the truth or that for some other reason the judge could not reasonably accept that the tests had been performed satisfactorily. With regard to the second example, it was again for the judge to assess the actual evidence he heard (as opposed to what evidence he *might* have heard) and to decide whether he accepted it, and if so, in the context of all the other evidence, what weight he attached to it.

15. Therefore whilst A has put forward in some detail what he submits are failures in procedure when compared to what is said in the manufacturer's literature about the device, and what might be considered best practice in terms of its operation, there is nothing in that which causes me to consider the judge did not properly apply his mind to the evidence that was before him or that it was improper for him to have reached the decision that he did.

16. In his oral submissions A was at pains to emphasise that in his view the device was not working correctly and that any purported reading cannot be relied upon. PC Potter gave clear evidence as to what he saw displayed on the device, which was backed up by what he can be heard saying on the body worn camera footage, namely "75 away". The judge was entitled to take that evidence at face value and accept or reject it. He accepted it. Any suggestion that the officer fabricated the reading to meet a performance target or to support a road safety campaign has to be supported by solid evidence and there is none.

17. As the transcript shows at page 47 para C onwards, Judge Davies applied his mind to all these points: *"The crux of this case is the reliability of Police Constable Potter's evidence, particularly when assessed in light of the agreed and accepted absence of any printout or picture of the laser device."* He then mentions some of the perceived failings, *"There is no direct evidence before me that the device examined was the specific one used by PC Potter but adopting any concerns about circumstantial evidence, which here include the timing, the date, the direction and the speed, plus the fact that PC Potter had in fact requested this officer to examine a device, I am satisfied, I have no doubt that he was examining the device used by PC Potter on duty that day. I have had to examine that carefully because, as we know, there is no photo or printout of the device at the time that PC Potter said it read 75 miles per hour and that is just the sort of evidence we would usually see to fully corroborate the officer's evidence that someone was travelling at a particular speed."*

18. In so far as there is anything within the appeal submissions and materials that was not considered as part of the trial there are two points to make. The first is that during a Pre-trial Review hearing in the Magistrate's Court on 19 July 2023, Lt Bailiff Finch ruled there was no basis for the disclosure of the documentation referred to in paragraph 87 of A's skeleton argument, namely a calibration certificate, details of PC Potter's training and any guidelines or manuals which Guernsey Police may have with regard to the matter charged. Lt Bailiff Finch did however leave the issue open to further consideration during the trial. Of course, I am not bound by his ruling but it seems to me to have been appropriate. The second point to make is that in terms of A's submission during the hearing that the prosecution should have either made wider disclosure of unused material or produced material as evidence, it seems to me that none of the material that has been drawn to my attention now meets the test for fresh evidence being admitted – in respect of which, although since developed, see Law Officers v Collins (1989) 8 GLJ 8. It is clear from the chronology that the manufacturer's material that A now seeks to rely upon was available to him prior to trial but he chose only to obtain it once he had been convicted. Whilst I accept he is, and was, unrepresented and may have taken a different path had he been represented at the time, the fact remains he knew what the planks of his defence were but chose not to pursue getting the material from the manufacturer which he clearly believed was likely to help his case.

19. Having now considered that material as part of his appeal, I am of the view that disclosure was not required but even if it had been adduced or disclosed it would not have led to a different outcome, given the judge's findings. This deals with A's third, and main, ground of appeal.

20. The second, and related, ground of appeal is that there was evidence before the court of which A was previously unaware. This ground seems principally to relate to PC Potter's use of his pocketbook and it not having been disclosed in advance of the trial. The prosecution contend, and I have no reason to doubt, that the pocket book was referred to in the schedule of unused material provided to A in advance of the trial. I have assumed that an explanation of what the schedule is and how any material referred to in it may be examined was included as there is nothing to suggest A did not receive this. In so far as any question arises as to whether the prosecution had a duty to provide a copy of the pocketbook in advance of the trial, the test to be applied was laid down by the Guernsey Court of Appeal in the case of Taylor v Law Officers Guernsey Judgment 13/2011. The prosecution contend in this case that there was nothing in the officer's note which met the disclosure test of either undermining the prosecution case and/or assisting the case for the defence. I have not been shown anything that casts doubt upon this assertion, either generally or in terms of undermining the evidence of PC Potter specifically. PC Potter explained he had made a cursory note of a satisfactory pre-test and that is what the evidence suggests the pocketbook showed.

21. The fourth ground of appeal has largely been covered by points I have made already but more generally I have found nothing in the pre-trial and trial process that could be said to give rise to any unfairness. As I have already alluded to, it seems to me that within the bounds of permissible assistance that might be given by a judge to an unrepresented defendant, Judge Davies did all that might reasonably be expected to assist A. It is not for a judge to act as a defendant's advocate but it is incumbent upon him to ensure a fair trial takes place. This can be done by asking questions that are designed to extract all the information that might reasonably be expected to be received in any other situation.

22. The last question I must answer, as I have indicated above, is whether the judge below was entitled to find on the evidence before him that the A's speed was such as to satisfy the test of being dangerous in accordance with the test laid down in Simon. In my view he was. It has often been said in Guernsey courts that a speed that is more than twice the permissible legal limit in a Guernsey context is, without more, inherently dangerous. Whether or not that is correct, in this case it has to be noted that although the road was not especially busy there was clearly plenty of other traffic about (as would be expected during the late afternoon or early evening of a weekday), the offence occurred on a main thoroughfare into and out of Town that has junctions on either side of the road from which traffic could emerge and at least one person can be seen on the pavement. In all those circumstances a speed of 75 mph was clearly dangerous, as the judge found.

23. It is for these reasons the appeal against conviction was dismissed.

Graeme D McKerrell,
Lieutenant Bailiff

22nd January 2024