Appeal against conviction (on a guilty plea) on 15th August 2024 in the Magistrate's Court for assault by spitting at a person unknown.

[2025]GRC003

IN THE ROYAL COURT OF GUERNSEY
(CRIMINAL DIVISION)

ON APPEAL FROM THE MAGISTRATE'S COURT
APPEAL AGAINST CONVICTION

Before: Catherine Maureen Fooks, Judge of the Royal Court

MICHAEL LE GALLEZ

- v -

THE LAW OFFICERS OF THE CROWN

Date of Hearing: 19th December 2024
Draft Judgment: 3rd January 2025
Final Judgment: 13th January 2025

Advocate S. E. Steel appeared for the Appellant

Advocate L.C. Roffey appeared for the Crown

Cases and materials referred to in the Judgment:

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

Law Officers of the Crown v Townsend (1995) 20 GLJ 3
M J Ogier v the Law Officers Jmt 26/2006
R. v. Forde (1923) 2 KB 400

Blackstone's Criminal Practice 2025
Archbold 2025

JUDGE OF THE ROYAL COURT:

Introduction

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1. This is an appeal by Michael Le Gallez ("A") represented by Advocate Steel against his conviction (on a guilty plea) on 15th August 2024 in the Magistrate's Court for assault by spitting at a person unknown in the North Plantation on 15th June 2024 for which he received a sentence of 1 month's imprisonment. A pleaded guilty in the Magistrate's Court so requires leave to appeal against conviction.

2. The appeal against conviction was only lodged on 10th October and initially Advocate Roffey representing the Law Officers was opposing the application to extend time but, having heard that Advocate Steel was only instructed on 8th October, withdrew opposition to that application.

3. A has also appealed against his sentence for the assault which was ordered to run concurrently with a similar sentence imposed on the same day for a section 4 public order offence.

4. The appeal was heard on 19th December and I reserved judgment. I was provided with a bundle of papers, which I had read in advance of the hearing. At the hearing I had an opportunity to watch the CCTV of the assault and both counsel made oral submissions. I have re-read everything but will only refer to what is directly relevant to my decision.

The proceedings in the Magistrate's Court

5. A entered his guilty plea to the assault on 22nd July 2024. He was at that time represented by Advocate Domaille who was the Duty Advocate. It is common ground that, at the time of the assault, A was being escorted in handcuffs by the police from premises into the North Plantation, having been arrested for the section 4 offence. It can be seen from the transcript on 22nd July 2024 that Advocate Domaille set out the basis of plea as A having spat in the direction of an unknown male ("UM") who put his middle finger up at A, that A had not intended to hit him but had spat in his direction and the spittle had landed short on the floor (sic). Advocate Domaille stated that there was no statement of complaint from the UM and the basis of plea was based on the CCTV and the police officers' statements. The Prosecuting Advocate accepted A's basis of plea with some initial reluctance on the question of intent. She confirmed that she was not seeking to prove intention and agreed with the learned Judge of the Magistrate's Court when he said that he could watch the CCTV and reject A's assertion of lack of intention. Although not spelt out, it is implicit that the basis of plea, which was accepted by the Prosecuting Advocate, was of reckless assault.

6. A returned for sentencing on 15th August 2024 and was again represented by Advocate Domaille as duty Advocate. The learned Judge watched the CCTV and said "*And what is shows me….. is whether it landed or not is irrelevant, it was aimed towards that person"* which is accepted by all as a finding that the spitting was intentional. The learned Judge sentenced on the basis of an assault by spitting in the direction of a member of the public adding *"it matters not to me whether it landed or not"*.

The law on assault

7. It is necessary to set out the basic elements of the offence of assault in Guernsey. It is accepted that it replicates the English common law offence of assault (but also incorporates the separate English common law offence of battery with which I am not concerned here). The commentary in Blackstone's Criminal Practice 2025 at B2.1ff is highly persuasive, at the very least, and both counsel referred to it. Assault is defined as *"where D intentionally or recklessly causes another to apprehend immediate and unlawful violence"*. The actus reus is conduct which causes the victim to apprehend the imminent application of unlawful force upon the victim. The conduct may take the form of threatening acts or gestures including brandishing a weapon at the victim or firing a shot in the victim's direction. There is no need for any actual application of force. Although there can be an assault if there is a failed battery ie the blow does not connect, assault is a "result crime" so is only made out if the victim apprehends the imminent unlawful force or threat of such violence. There is no assault if a stone thrown at the victim flies past the

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victim unnoticed. Apprehension does not require the victim to be afraid and the victim may, in fact, relish the opportunity to retaliate but it does require that the other person is aware of the threat or the violence. It is said in paragraph B2.5 that the apprehension must be proved or formally admitted; it cannot suffice to prove that the victim "may well" have anticipated a blow etc. The mens rea of assault is that it is committed intentionally or recklessly, ie recklessness as to the risk of assault. Recklessness is subjective but the defendant's state of mind can be inferred from the circumstances including video footage.

The advice given

8. Legal Professional Privilege was waived by A so Advocate Steel provided his email to Advocate Domaille of 9th October 2024 in which he raised that the spittle did not hit the victim, that there appeared to be no statement to say that the victim was in fear of immediate violence, asked Advocate Domaille to explain why there was a guilty plea to the assault and stated that Advocate Steel could not see how the offence was made out. Advocate Domaille responded the following day that he was in France with no access to his notes and was working from memory. He said that A had very little recollection of events and the pleas were based upon what the judge was likely to determine from viewing the CCTV. The options of guilty, not guilty or a Newton hearing were put to him. Advocate Domaille's view was that the CCTV showed what *"looked like a deliberate attempt to hit a third party with [A's} spittle"*. There was an unsuccessful attempt to get the Prosecutor to drop the case. A did not wish to plead not guilty and risk being found guilty so Advocate Domaille tried to minimise the risk of an immediate custodial sentence by offering the basis of plea that the spitting was not deliberate. In Advocate Domaille's view, based on the judge viewing the CCTV would have *"almost definitely led to a finding of guilt on a full factual basis",* a view supported, he suggested, by the finding made by the Judge that the spitting was deliberate.

9. It is incontrovertible that Advocate Domaille did not specifically answer the question about the element of "fear of immediate violence" nor was he pressed so to do. Whilst A has said through his counsel that he was not given specific advice on the element, he has not filed any statement.

The Grounds of Appeal and the Law

10. Section 2(1)(b) of The Magistrate's Court (Criminal Appeals) (Guernsey) Law, 1988 limits appeals following guilty pleas thus:

> *"2. (1) No right of appeal shall arise under this Law –*
> *[…] (b) against the conviction of any person for an offence to which that person has pleaded guilty…..*
> *(2) Notwithstanding the provisions of subsection (1)(b) above, the Royal Court* <u>*may*</u> (my emphasis) *in exceptional circumstances grant leave to appeal against conviction where the appellant has pleaded guilty […]"*

The section is self-explanatory but it is worth observing that the decision as to leave is a discretionary one.

11. The Magistrate's Court (Criminal Appeals) (Guernsey) Law, 1988 does not specify the ground on which an appeal against conviction can be made, if leave is given, so the approach of this Court has been to treat the grounds available as being those that can be pursued on an appeal from a conviction on indictment in this Court to the Court of Appeal under The Court of Appeal (Guernsey) Law, 1961, of which section 25(1) reads: "*The Court of Appeal on any such appeal against conviction shall allow the appeal if it thinks that the verdict should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence, or that the judgment of the court before whom the appellant was convicted should be set aside on the ground of a wrong decision of any question of law or that on any ground there was a miscarriage of justice, and in any other case shall dismiss the appeal."* It must be noted that it

has been stated repeatedly by the Court of Appeal that this test is more limited than the "unsafe or unsatisfactory verdict" test in England.

12. The grounds of appeal are that *"there was no evidence to prove an essential element of the offence (apprehension of immediate unlawful violence). It had been accepted that no spittle contacted the person unknown. The person unknown provided no statement to police. There was no other evidence to prove the person unknown feared unlawful violence. At the time of the spitting, the appellant was in handcuffs whilst being escorted to a police van by police officers."*

13. Neither counsel filed any authorities on the approach of the Court to appeals from guilty pleas. The test is set out in the case of the Law Officers of the Crown v Townsend (1995) 20 GLJ 3. That report reads: "*A had been convicted by the Court of Alderney, upon his guilty plea, of conduct likely to cause a breach of the peace. He applied pursuant to the Magistrate's Court (Criminal Appeals) (Guernsey) Law, 1988 for leave to appeal against his conviction, notwithstanding the guilty plea, on the grounds that the facts were such that there was a real doubt whether the conviction would have been upheld had there been a not guilty plea; and that there had been undue pressure on him to plead guilty. HELD by the Deputy Bailiff, dismissing the application, such applications, according to the 1988 Law, were only to be allowed in exceptional circumstances and should only be allowed where later evidence* (my emphasis) *showed clearly that the basis on which a guilty plea had been tendered was wrong or that there had been some other exceptional matter. Following R. v. Forde (1923) 2 KB 400, where a plea of guilty had been recorded, a plea against conviction could only be entertained if it appeared that the appellant did not appreciate the nature of the charge or did not intend to admit that he was guilty of it, or that upon the admitted facts he could not in law have been convicted of the offence charged*." All of those examples would, of course, constitute a miscarriage of justice. If Advocate Steel can persuade me that there was no evidence on an essential element of the offence, that would constitute a miscarriage of justice.

14. Neither counsel filed any authority on the materials needed by the Court when considering appeals based on counsel's error. There is a reported case of appeal from a conviction following trial in the Magistrate's Court based on counsel's error namely M J Ogier v the Law Officers Jmt 26/2006. In that case the Appellant and Advocate whose conduct was challenged gave statements and evidence at the hearing. It is clear from the equivalent and more recent caselaw in England on the issue of appeals based on counsel's error that an appellant has to present the advice fully and involve the previous counsel. I see that requirement as applying equally to an appeal from a guilty plea based on bad advice.

15. Paragraph D26.9 of Blackstone's and paragraph 7-76 of Archbold 2025 cover the topic of appeals against conviction following guilty pleas which I have found of general assistance but with the caveat that the basis test for appeals in England is wider than in Guernsey. It is said that the approach to an appeal following a guilty plea is not to be equated with an appeal based on insufficiency of evidence. If the defendant admits facts which constitute an offence by way of an unambiguous and deliberately intended plea, he cannot ordinarily appeal against conviction as there is nothing unsafe about a verdict based on his own voluntary confession in open Court. Three categories of exceptions are set out, the relevant one of which is where the plea is vitiated which can include by erroneous legal advice if its effect was to deprive the defendant of a defence which would probably have succeeded and the court concludes that there was a clear injustice. It goes without saying that the burden of establishing that the case falls within that exception lies with the appellant.

16. Section 6 of the Law provides that this Court can confirm, reverse or vary the decision appealed against, may remit the matter with its opinion thereon to the Magistrate's Court or make such other order in the matter as may be just, thereby exercising any power which the Magistrate's Court might have exercised. The Appellant invites this Court to reverse the decision and substitute a verdict of not guilty. Advocate Roffey saved any lengthy debate as to the effect of that in terms of a further prosecution by indicating that it was not deemed in the public interest

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to bring another case were the conviction to be reversed. A successful appeal may impact the appeal lodged against sentence on the section 4 matter.

Counsel's submissions

17. Advocate Steel's submitted that A was not advised of the elements of the offence of assault and that, had A been aware of them, he would have denied the offence as he does not accept that the victim had reason to feel fear of immediate violence. In short, A did not know what he was accepting. There was no direct evidence in the form of a statement that the UM had apprehended immediate unlawful violence nor is there any res gestae evidence in the form of comments made in the heat of the moment. Advocate Steel submitted that, as A was handcuffed, it was unrealistic that the UM would have suffered any unlawful violence and that it cannot be assumed that he felt such fear. I agree with Advocate Roffey that the handcuffs are a red herring as it is perfectly possible to spit whilst handcuffed, as indeed A demonstrated, and there is no requirement for the UM to apprehend any wider threat of violence; that was not part of the prosecution case. In Advocate Steel's submission, the only way of proving it was by a statement from UM as that was the only way of knowing what was going through his head. There was discussion at the hearing about evasive action and I think that Advocate Steel had to accept that if UM was seen to take evasive action, that would be sufficient proof of apprehension. In short, A's submission is that there is no credible evidence that an assault was committed at all. Other offences might be disclosed such as attempted assault or section 4. The effect of the advice on plea deprived A of the chance to advance an argument that there was insufficient evidence that the offence had been committed. A should not have pleaded guilty to assault and the conviction is unjust. Advocate Steel was at pains to make clear that there is no criticism of the learned Judge in respect of his sentencing exercise. The Judge was entitled to view the plea as sound in the sense that all the elements of the offence had been considered. I note that at no point did Judge Perry raise any concern about the apprehension element.

18. Advocate Roffey urged me to focus on the need for A to overcome the hurdle of securing leave to appeal by demonstrating "exceptional circumstances". He submitted that the materials relied upon by A in terms of the email exchange between Advocate Steel and Advocate Domaille did not establish that A was not advised about the elements as Advocate's email is silent on that issue and Advocate Roffey made the point that Advocate Domaille was relying only on his memory. In terms the Court does not have sufficient evidence that there was a lack of advice on the elements. On the question of whether there was sufficient evidence of assault and apprehension in particular, he accepted that the apprehension has to be proved or admitted. He provided various witness statements which were provided to Advocate Domaille and on which he based his advice. Those statements included two from police officers who were escorting A outside and holding him state that he spat that A "spat at" UM who had, on one account, laughed at him and on another stuck his middle finger up at A and there is also reference to the two men trading insults. One officer holding A described A lunging towards A before spitting. The CCTV shows the two men 1.5 – 2 metres apart facing each other and, he added, looking directly at each other. Advocate Steel rebutted the suggestion that the apprehension could be established through the close proximity of A and the UM together. It cannot be known if UM saw A spit at him. It was very small and very quick. Advocate Roffey drew attention to the learned Judge's sentencing remark that the spitting was aimed towards UM. Advocate Steel said that that went only to intent and that is right as that was the point he was asked to decide. Advocate Roffey said that it did but it also went to the issue of UM's perception and the implausibility of him thinking anything other than A was spitting at him.

19. Advocate Roffey said that a statement from UM was not the only way of proving apprehension. It is sometimes proven by other evidence eg CCTV and the Court could conclude that UM was "inevitably" well aware of the spit that had been aimed at him. He agreed with Advocate Domaille that the Court was very likely to find A guilty had he pleaded not guilty. A, on advice,

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pleaded guilty and there is no clear evidence that the plea was incorrect or equivocal. In his submission, the appeal at its highest raises a potential line of defence which could have been taken but which may well have failed. He went further and submitted that, even if, despite the lack of evidence, I were persuaded that there had been no advice on a key element of the offence, that would still not be sufficient for A to clear the hurdle of exceptional circumstances.

20. Advocate Steel responded that the issue was not one of a defence but of an argument that there was no case to answer. The absence of any reaction by UM be it evasive or aggressive supports him not having apprehended the spitting.

Discussion

21. The starting point is that A has no right of appeal as he pleaded guilty to the offence of assault. In order to succeed in this appeal, A must persuade me that there are exceptional circumstances which would lead me to exercise my discretion to grant leave. A's ground of appeal is that there was no evidence before the Magistrate's Court which was capable of establishing the essential element of apprehension of immediate and unlawful violence. His argument is not insufficiency of evidence in the sense of a challenge to the finding of guilt by the Court rather that A was wrongly advised to plead guilty. A has to and does accept that the plea of guilty amounted to acceptance that the element was satisfied. It is for A to satisfy me that there was erroneous advice. A's case is that there was no advice as to the essential element of apprehension. Limited evidence has been produced in the form of the exchange of emails between Advocate Steel and Advocate Domaille. As noted earlier, in his response, Advocate Domaille does not deal directly with the issue of apprehension. His response is given from memory some weeks after the hearing. He is not asked to access his notes or pressed to respond specifically on the issue of apprehension. A, through his counsel, asserts that he was not advised on the elements but there is no evidence from him as such. It is not clear, therefore, whether there is a dispute over what advice was given, which dispute I could have resolved by hearing evidence.

22. It is clear that Advocate Domaille give advice on the issue of pleas and a possible Newton Hearing. His view was that the case against A based on the CCTV and statements was strong and A decided not to take the risk of pleading not guilty. A basis of plea to reckless assault was entered with a view to limiting the sentence. That basis of plea was rejected by the learned Judge who was clear that the spitting was intentionally aimed at another person. The judge raised no issue as to the issue of apprehension. He was entitled to proceed on the basis that that element was accepted. It is clear from Advocate Domaille's email that he was hoping for a lighter sentence.

23. A, through his plea, given unequivocally and with the benefit of legal advice, accepted that the element of apprehension was made out and it is for him to persuade me that the plea is vitiated through erroneous advice. There is insufficient evidence from A and from Advocate Domaille to satisfy me that Advocate Domaille did not give any advice on the issue of apprehension. I have gone on to consider what evidence there was of apprehension more widely as, were A able to demonstrate that there was no evidence of apprehension at all such that he could not have been convicted of the offence had he been tried, that would be a miscarriage of justice whether viewed as an error by counsel in terms of not spotting it or more generally.

24. Apprehension will often be proved by way of a statement from the victim but it need not be. It can be proved by evidence from witnesses at the scene or by video footage and it can be established by inference from the circumstances. In this case the witness statements focus on the conduct of A rather than the reaction of UM but they are clear that he spat at UM and that they were exchanging insults in one way or another. They were standing close to each other facing each other. The CCTV shows A and UM looking at each other as A spat. It shows no reaction from A either evasive or retaliatory but neither does it show UM looking away or turned away so as to give rise to any real doubt as to whether he apprehended or not. My

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conclusion is that A might have been successful in arguing that the element of apprehension was not made out but that there was not such a lack of evidence here as to conclude that there was no evidence on that element such that A's conviction is a miscarriage of justice.

Conclusion

25. For all the above reasons, the application for leave to appeal is dismissed.

Postscript

As I was about to have this judgment sent out to counsel for any comments prior to issue, an email was received from Advocate Steel attaching a further email from Advocate Domaille in which he states that he did give A specific advice on all the elements and the possibility of a not guilty plea and that A did not want to take the risk. Advocate Steel does not seek to dispute what Advocate Domaille says and adds *"The Appellant stands by the submission made at the outset of oral submissions – a deliberate attempt to spit at another is insufficient to amount to an assault; there needs to be a victim who apprehends it happening*". The receipt of this email affirms my decision that there was insufficient evidence of a lack of advice on the element of apprehension and it does not change my conclusion that I do not consider that there was no evidence from which the Court could conclude apprehension.

I end by observing that the additional information from Advocate Domaille was significant and demonstrates the need to secure proper statements from former counsel and appellants where there is a challenge based on allegedly erroneous advice.

Catherine Fooks
Judge of the Royal Court

13th January 2025

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