

Appeal by the Law Officers against the acquittal of Ian Tostevin - sections 1 and 6 of The Magistrate's Court (Criminal Appeals) (Guernsey) Law, 1988. Appeal dismissed.

[2025]GRC008

**IN THE ROYAL COURT OF GUERNSEY
(CRIMINAL DIVISION)**

**ON APPEAL FROM THE MAGISTRATE'S COURT
PROSECUTORIAL APPEAL AGAINST ACQUITTAL**

Before: Catherine Maureen Fooks, Judge of the Royal Court

THE LAW OFFICERS OF THE CROWN

- v -

IAN STEWART TOSTEVIN

Date of hearing: 4th December 2024

Judgment handed down: 13th February 2025

Crown Advocate F M Russell appeared for the Crown

Advocate C J Green appeared for the Appellant

Cases and materials referred to in the Judgment:-

The Magistrate's Court (Criminal Appeals) (Guernsey) Law, 1988, as amended

The Magistrate's Court (Criminal Appeals) Rules, 1989, as amended

The Summary Offences (Bailiwick of Guernsey) Law, 1982

The Administration of Justice (Bailiwick of Guernsey) Law, 1991

The Indictments (Guernsey) Law 1950

The Law Officers of the Crown v R 26th April 2018 (unpublished)

The Magistrate's Court Act 1980

Garfield v Maddocks 1974 QB 7

New Southgate Metals Limited v London Borough of Islington 1996 Crim LR 334

Blackstone's Criminal Practice 2025

JUDGE OF THE ROYAL COURT:

Introduction

1. This is an appeal by the Law Officers, represented by Crown Advocate Russell, who also prosecuted the matter in the Magistrate's Court, against the acquittal by the Magistrate's Court of Ian Stewart Tostevin ("R") on 10th September 2024 on a single charge of behaving in a disorderly manner contrary to section 1(c)(ii) of the Summary Offences (Bailiwick of Guernsey) Law 1982, as amended. The Appeal is brought by way of a question certified by the learned Judge of the Magistrate's Court in the following terms:

"Q: Where no application is made to amend the charge before a verdict is reached in a trial of an offence of disorderly behaviour in a public place contrary to section 1(c)(ii) of The Summary Offences (Bailiwick of Guernsey) Law, 1982, if there is evidence that the alleged conduct took place in public, but ambiguous as to whether it was at the precise location stipulated in the charge:

*a) is this a material defect that should result in an acquittal; and
b) if it is material, and rather than acquitting the defendant, is it the role of the judge to give the prosecution an opportunity to amend the charge before returning a verdict:
c) if the answer to b) is yes, should the defence be given the opportunity of an adjournment".*

2. There was a false start to this appeal in that a notice was filed which did not conform with that required by Rule 1(1) The Magistrate's Court (Criminal Appeals) Rules, 1989, as amended and, initially, the Judge had not been asked to certify the question but those errors were rectified and the question certified so the appeal was listed for 4th December when it was heard. The Certificate does not make it clear whether the question is one of law or mixed law and fact but the Notice document says that it is a point of law and the broad nature of the question confirms this. I was given a file of papers to which some materials were added in the course of oral submissions. I have considered everything placed before me together with the Defence Case Statement which I accessed and I also listened to the recording of the closing speech of Advocate Green who appeared in the Magistrate's Court for R, as he does on this appeal.

The Legal Principles Applicable to Appeals

3. Appeals by the Law Officers against acquittal are governed by sections 1 and 6 of The Magistrate's Court (Criminal Appeals) (Guernsey) Law, 1988

"1. Subject to the provisions of this Law, after the hearing and determination by the Magistrate's Court of any criminal case or matter which the Magistrate's Court by any Law or Ordinance now in force or hereafter to be made, has power to hear and determine, there shall be a right of appeal to the Royal Court –

(a) if such case results in the conviction of any person, at the instance of the person convicted, against such conviction, or sentence imposed, or both,

(b) if such case results in the acquittal of any person, at the instance of the prosecution against such acquittal:

PROVIDED that no appeal shall rise unless the Magistrate's Court, upon the application of the prosecution, certifies that there was in contest in the case a question of law or of mixed law and fact which it would be desirable to have decided by the Royal Court.

6. (1) *On the termination of the hearing of an appeal the Royal Court*

- (a) *may confirm, reverse or vary the decision appealed against, or*
- (b) *may remit the matter with its opinion thereon to, the Magistrate’s Court, or*
- (c) *may make such other order in the matter as may be just, and by such order exercise any power which the Magistrate’s Court might have exercised.*

(2) [...]

(3) *Without prejudice to the powers of the Royal Court to remit a matter to the Magistrate’s Court under subsection (1)(b) above, if on any appeal at the instance of prosecution, the Royal Court finds that the acquittal of an accused person arose out of the erroneous determination by the Magistrate’s Court of the question of law or of mixed law and fact with regard to which the appeal has been brought the Royal Court may remit the case to the Magistrate’s Court together with a direction that the Magistrate’s Court shall record a conviction against such person and thereupon Her Majesty’s Procureur shall summon such accused person to attend the Magistrate’s Court and the Magistrate’s Court shall record such conviction accordingly and shall pronounce such sentence in regard thereto as may be just. The provisions of this Law with regard to the right of appeal against sentence shall apply to such sentence.”*

4. In this case I am asked to reverse the decision and to remit the matter to the Magistrate’s Court for sentence. Insofar as I might dismiss the appeal, Crown Advocate Russell has indicated that the Law Officers would not seek to bring fresh proceedings.
5. My task is to answer the questions posed. This is important as I was not asked whether the learned Judge made an error of law when he stated that he had no power equivalent to section 123 of the Magistrate’s Court Act 1980 (“MCA 1980”) which would certainly have been an easier question to answer as he clearly did.

The trial proceedings

6. It is important to be clear exactly what happened in the Magistrate’s Court. R pleaded not guilty to the single charge which was as follows:

“That you on 13th October 2023 in a certain public place, namely Route de Saumarez, Castel, behaved in a disorderly manner, contrary to section 1(c)(ii) of the Summary Offences (Bailiwick of Guernsey) Law, 1982, as amended.”

Prior to the trial, Advocate Green had filed a Defence Case Statement (“DCS”) which indicated the defence to be that R had made an honest mistake with woman’s identity, that he had not sworn or made any racist comment and that the CCTV was unclear and dark. Nothing was said about the precise location. There was a trial which, it appears, proceeded in the usual way. Evidence was given that R had boarded the number 42 bus which was travelling into Town from the area of Saumarez Park. A man and his wife, who is of Chinese ethnicity, were already on the bus with their child and it was alleged that R spoke to the wife, claiming (wrongly) to know her and tried to touch the child’s face twice. The man told R “enough” whereupon R went to sit at the back of the bus saying “fucking doppelgangers” which the man and his wife took to mean that all Chinese people look alike. Nothing further happened. The family got off the bus. They made a complaint and the CCTV was recovered and was played to the Court.

The man and his wife gave evidence. No evidence was led on the precise location of the alleged disorderly behaviour.

7. Advocate Green did not make any submission of no case to answer and, after a short adjournment, R did not give or call any evidence and Advocate Green went straight to closing. He put the Prosecution to proof. He made the point that neither witness could say at what point R had boarded the bus. There was a lack of evidence to show exactly where exactly events truly took place in terms of the bus route. At this point the learned Judge asked Advocate Green if he needed to say more than that. Advocate Green asked if he meant in terms of location. The learned Judge asked “... *is that not your best point?*” Advocate Green said that it was his strongest point and decided not to make any further submissions. The learned Judge proceeded to issue his reasoned verdict of not guilty. A transcript is at tab 2 of the bundle. Having set out the burden and standard of proof, he went on:

“ I return to the wording of the charge, which is important. The charge alleges that you on the 13th October 2023, in a certain public place, namely Route de Saumarez, Castel, behaved in a disorderly manner. It is important to note that there is no equivalent to Section 123 of the Magistrate’s Court Law 1980 in the UK, in this jurisdiction. Equally, unlike the Royal Court, I have no power to substitute alternative verdicts or strike out parts of the charge that are not proved and still return a verdict of guilty. The charge doesn’t read on the No.42 bus, it reads at a specific location, namely Route de Saumarez, alleging that that is a public place, a key element of the charge. I have heard no evidence whatsoever that the incident took place on Route de Saumarez in the Castel and therefore I have no choice other than to acquit Mr Tostevin.”

Crown Advocate Russell set out in her submissions that the case was brought on the basis that, no matter on which road the bus was travelling when the offence was committed, the behaviour of R on the bus amounted to disorderly behaviour. She was candid that she did not consider the lack of evidence that the alleged conduct had occurred in a specific road to be material so she would not have considered applying to amend.

8. It is common ground that the learned Judge made an error of law when he said that there was no equivalent of section 123 of the MCA 1980 because there is an equivalent namely The Administration of Justice (Bailiwick of Guernsey) Law, 1991, (“the AJL”) section 6 of which reads:

Minor defects in process.

“6. (1) No objection shall be allowed to any charge or summons for any defect in it in substance or in form, or for any variance between it and the evidence adduced by the prosecution at the hearing in the Magistrate's Court.

(2) If it appears to the Magistrate's Court that any variance between a charge or summons and the evidence adduced on behalf of the prosecution is such that the accused has been misled by the variance, the court, shall, on the application of the accused adjourn the hearing.”

The Summary Offences (Bailiwick of Guernsey) Law, 1982

9. The relevant parts of section 1 (c) of The Summary Offences (Bailiwick of Guernsey) Law, 1982 (“SOL”) are as follows:

*“A person who – [...]
(c) in any public place [...] –
(i) [...] or
(ii) behaves in a disorderly [...] manner*

shall be guilty of an offence...

There is a definition of “public place”:

"public place" includes any road, street or lane and any other premises or place to which at the material time the public have or are permitted to have access, whether on payment or otherwise.

10. Crown Advocate Russell provided the relevant passages from Blackstone’s (D11.23ff) on the issue of places as Particulars in Indictments. That learning is equally applicable to charges and, indeed, some of the caselaw considered relates to summary matters. Section D 11.40 deals with places. The general principle is that places are not material unless they form an element of the offence so one can distinguish murder where the place is not material from dangerous driving where the road should be named.

The Legal Principles Applicable to section 6 of The Administration of Justice Law 1991 and Amending Charges

11. Section 6 of AJL (“section 6”) is considered in an unpublished judgment of Judge Finch (as he then was) which, with his agreement, I have anonymised and produced for counsel entitled *The Law Officers of the Crown v R* 26th April 2018. This was a Prosecutorial appeal to the Royal Court from the Magistrate’s Court brought against an acquittal in which the question was whether specific words in a charge have the effect of imposing a burden on the prosecution to prove that an offence was committed in precisely the manner alleged. The specific issue was over the difference between taking a phone “to” or “into” a particular address. In that judgment, he refers to the very wide wording of section 6, which, he says, must be interpreted by reference to the words of Lord Widgery CJ in Garfield v Maddocks 1974 QB

“Those extremely wide words, which on their face seem to legalise almost any discrepancy between the evidence and the information, have in fact always been given a more restricted meaning, and in modern times the section is construed in this way, that if the variance between the evidence and the information is slight and does no injustice to the defence, the information may be allowed to stand notwithstanding the variance which occurred. On the other hand, if the variance is so substantial that it is unjust to the defendant to allow it to be adopted without a proper amendment of the information, then the practice is for the court to require the prosecution to amend in order to bring their information into line. Once they do that, of course, there is provision in [s.123(2)] whereby an adjournment can be ordered in the interests of the defence if the amendment requires him to seek an adjournment.”

Judge Finch also cited from the English case of new Southgate metals limited v London borough of Islington 1996 Crim LR 334 (also cited in Blackstone’s) in which they were said to be three types of error as follows:

Ultimately the appeal in R was dismissed on two grounds one of which was that, there having been no amendment to the charge, the evidence did not satisfy the specific wording of the charge to prove that the defendant took the phone to the address specified rather than into that address. Judge Finch observed that, had an application to amend been made, it might well have been successful with an adjournment being offered to the defence. It was said that the prosecution had the opportunity in that case to reflect on the issue raised and to seek an amendment before the case was closed which was not done.

12. Whilst, contrary to Advocate Green’s submission, the decision of Judge Finch in R is not binding on me, I agree with him that it is a helpful and relevant decision. It confirms my own view that the English case law on the interpretation of section 123 of the MCA is highly

persuasive when considering the interpretation of section 6 of the AJL. I also found the commentary in Blackstone's Criminal Practice 2025 helpful.

13. The position can be summarised thus, if the variance is minor, section 6 prohibits any objection being taken to the charge on the ground of variance and, if the D has been misled and asks for an adjournment, he is to be granted one. If, however, the variance is material (but not fundamental) the prosecution may apply to amend the charge. The decision to allow an amendment to a charge is discretionary and case specific. If an amendment is allowed, the defendant would be granted an adjournment if required in the interests of justice.

Counsel's submissions

14. Crown Advocate Russell's primary submission was that the alleged behaviour was on a bus, a place to which members of the public had access, which is a (her emphasis) public place and therefore satisfies the wording of section 1 (c) of the SOL. The exact location of the bus and/or reference in the charge to a specific road was not material. The wording would have satisfied the requirements of section 2(1) of The Indictments (Guernsey) Law 1950 and that R was in no way prejudiced or misled by the wording. He knew exactly what case he had to answer. She referred to the lack of any reference in the Defence Case Statement to any issue with the location. It cannot be said that the conduct did not occur in Route de Saumarez. It is an unknown.
15. Crown Advocate Russell submitted that the learned Judge disregarded the provisions of section 6. Where there was a variance, the correct procedure to be adopted is as in Garfield quoted above. In this case the variance as to location should not have resulted in an outright acquittal. The issue is whether the precise road was a material part of the charge and whether the learned Judge should have afforded the Prosecution an opportunity to amend the charge (I refine that to request to amend the charge).
16. Crown Advocate Russell sought to distinguish R on the basis that the issue was not the wording but the manner in which the alleged offence was committed. In this appeal there is no issue about the manner of offending, just an immaterial issue with the precise location. It is accepted that amending the charge was not raised. She did not consider it necessary to seek to amend the charge. There was really no opportunity to apply. The judgment was "brutally short". She (and Advocate Green) accepted that, whilst the learned Judge gave a large judicial hint to Advocate Green that no further submissions were required, he did not prevent the Advocate from making further submissions. In Crown Advocate Russell's submission, the issue raised by the Judge was a legal one and he should have invited counsel to address him. When there is a legal matter troubling the Judge, the resolution should not depend on the alacrity of counsel to leap to her feet. The learned Judge made an error.
17. Advocate Green submitted that the precise location of the alleged disorderly behaviour is material and that there is a material difference between conduct on a bus and conduct on a named road. The Prosecution had nailed its colours to the mast in naming the road. He relied heavily on the case of R which he submitted was directly on point to the issues in this appeal. As was made clear in that case, in his submission, the responsibility for raising the issue of amending the charge falls to the Prosecution, not the Judge. The Prosecution had time during the amendment requested by him in order to take instructions and prepare his closings to identify the issue and take steps to rectify it. The failure to act is key as it was in R. The reference in section 6 to an adjournment is for the benefit of the defence not the prosecution. He drew attention to the lack of any caselaw in which a Judge invited the Prosecution to amend its charge.
18. Advocate Green rejected any criticism that there was no mention of location in the DCS. He submitted that the issue over location was based on how the evidence came out.

19. He very fairly conceded that, had there been an application to amend, it would probably have been granted as the defect was not incurable. It would then have been appropriate to grant the defence an adjournment but that was not what happened and he urged me to focus on what did happen. He also (correctly) made the point that I do not have the evidence with which to challenge the learned Judge's finding that there was no evidence that the conduct occurred on Route de Saumarez. As discussed with both counsel, my options in this appeal are limited by the material before me and the points raised. Specifically I am not asked to replace the acquittal with a conviction. I am asked to remit the matter to the learned Judge at the point when he falls into error about section 6. Crown Advocate Russell very fairly indicated that if the matter is remitted, the Prosecution may not wish to pursue it.

Discussion

20. I start with a couple of general principles: the Magistrate's Court is a Court of summary jurisdiction and it is for the Prosecution to prove its case. Insofar as section 6 allows the Court to overcome what might be viewed as a technical defect which does not go to the heart of the case, its application is limited by caselaw in England, which we follow in Guernsey, as Judge Finch set out in R case, which I found to be on point.
21. I must focus on the Question posed but I emphasise that this was an unusual case and the sequence of events is most unlikely to be repeated.
22. The first question I am asked to determine is whether the lack of evidence on the location justified an acquittal. The offence of disorderly conduct requires that conduct to be in a "public place". In my judgment, the location of a charge of disorderly behaviour is material. The passage in Blackstone's makes it clear that where the place is an element of the offence, it must be particularised. The example of dangerous driving is apposite as the Law requires it to have occurred "on a (my emphasis) public highway". The requirement to name the road or, put another way, to particularise the place, is, in my judgment, equally applicable to "public place" in the disorderly manner offence. Further, in this case, a particular public place, a road, was chosen and the evidence did not come up to proof. Crown Advocate Russell suggests that it could have read "on the number 42 bus" and that this would have solved the problem. I do not need to decide that as that was not what it said. It is what it did say which matters. It said "in a certain (my emphasis) public place, namely Route de Saumarez" (my emphasis). That was what had to be proven. As Judge Finch in R said, a criminal charge is to be construed strictly and narrowly to which I add subject to section 6.
23. It was submitted by Crown Advocate Russell that my taking a narrow view on location in charges of disorderly conduct could have the result that those drafting the charges will broaden the drafting so as to avoid acquittals on technical points about the location which will be to the detriment of defendants who currently have the benefit of specific charges. I do not agree that my taking a narrow view in this case should or even could have that result. Whatever view I take cannot diminish the clear requirement to particularise the element of public place in accordance with the statutory elements of the offence itself and in accordance with the passage in Blackstone's on places to which I have referred. What has happened in this case is unusual and that the alleged conduct was on a moving vehicle required more consideration at the charging stage.
24. It is clear that the learned Judge had in mind section 123 of MCA. He was wrong that there is no equivalent in Guernsey. I can infer from his mentioning it that he might have considered exercising that power but I cannot infer that he would have done so nor can I infer that he would otherwise have considered that the Prosecution had proved its case.

25. Crown Advocate Russell's case is that, had the learned Judge been aware of section 6, he would have been required to raise it and give the defence an adjournment if the defendant had been misled by the variance. The caselaw cited in Blackstone's rather suggests that it is the Prosecutor who raises that section in England but I agree that, were a Judge to have it in mind, that would ordinarily lead to discussion and, if applied, to the possibility of an adjournment for the defendant. The question of who should be raising such points is at the heart of this appeal and specifically the second question.
26. The second question is whether the Judge should have given the Law Officers an opportunity to amend the charge before returning a verdict. It is common ground that, were this to have happened, the defence should be given the opportunity of an adjournment. An application to amend a charge can be made at any stage of a trial and will generally be allowed if there is no injustice to the defendant. Here there was no application to amend and the basis of the appeal is that the learned Judge should, nonetheless, have given the Prosecution an opportunity to amend its charge. If this means invited the Prosecution to apply to amend, I consider this a bridge too far. The Prosecution has to prove its case. The Prosecution needs to be alert to a variance between the evidence and the charge whether that leads to an application that the Judge uses section 6 or an application to amend. If the charge needs to be amended, the impetus must come from the Prosecution. Whilst the words "require the prosecution to amend" appear in Garfield, that does not mean that the Judge should raise it of his own motion. It means that the charge requires amendment. Placing the onus on the Judge to invite amendment could be viewed as contrary to the defendant's right to a fair trial. Crown Advocate Russell said that resolution of legal issues should not depend on the alacrity of counsel. I disagree even though I do acknowledge how quickly events unfolded in this case. Nonetheless, it was open to her to interrupt and point out his error regarding section 6 and, had she done so, the discussion could well have led her to apply to amend the charge. The variance was there to see at the end of the evidence. I do agree with her submission that, generally, if a Judge is troubled by a legal point, it should be raised with Counsel. In this case the learned Judge concluded that there was a fundamental and incurable defect. In his view, one of the elements had not been proven. In such a case ordinarily a Judge would not invite representations from the Prosecution. It has failed to prove its case and an acquittal follows.

Conclusion

27. The key issue arose in this case from a variance between the evidence and the charge which could and should have been addressed. Had Crown Advocate Russell realised the significance of it, she would have raised section 6 for consideration and/or asked to amend and I can see that, based only on what little I have, the outcome might have been different.
28. Turning to the precise questions in this case:

“Question: Where no application is made to amend the charge before a verdict is reached in a trial of an offence of disorderly behaviour in a public place contrary to section 1(c)(ii) of The Summary Offences (Bailiwick of Guernsey) Law, 1982, if there is evidence that the alleged conduct took place in public, but ambiguous as to whether it was at the precise location stipulated in the charge:

- a) is this a material defect that should result in an acquittal?

Answer: yes, the place at which the disorderly behaviour is alleged to have occurred is an element of the offence of disorderly behaviour so it should be particularised. If there is no evidence that the alleged offence took place at the place named in the charge, this is a material defect. If there is no application to amend, the defendant should be acquitted.

- b) if it is material, and rather than acquitting the defendant, is it the role of the judge to give the prosecution an opportunity to amend the charge before returning a verdict?

Answer: no, not in the sense of the Judge prompting the Prosecution to apply to amend. It is for the Prosecution to stay alert to variances and to be ready to apply to amend if there is a material defect.

c) if the answer to b) is yes, should the defence be given the opportunity of an adjournment?
Answer: Yes

29. In the light of the answers to the questions, the Appeal is dismissed.

Catherine Fooks
Judge of the Royal Court

13th February 2025