

Prosecution Appeal against acquittal, form of question for certification, Section 6 of The Administration of Justice (Bailiwick of Guernsey) Law, 1991, requirements for specific wording for criminal charges

[2025]GRC034

Prosecution Appeal against acquittal, form of question for certification, Section 6 of The Administration of Justice (Bailiwick of Guernsey) Law, 1991, requirements for specific wording in criminal charges.

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

Between:

THE LAW OFFICERS OF THE CROWN

Appellants

-v-

R

Respondent

**Prosecution appeal against an acquittal in the Magistrate's Court
by virtue of Section 1(b) of the Magistrate's Court (Criminal Appeals)
(Guernsey) Law, 1988, as amended**

Application heard on: 27th March, 2018

Decision handed down on: 26th April, 2018

Before: John Russell Finch, Esq., O.B.E., Judge of the Royal Court

Counsel for the Appellants: Advocate R J Calderwood

Counsel for the Respondent: Advocate P T R Ferbrache

Cases and Statutes referred to in Decision:

Garfield v Maddocks [1974] QB 7;

New Southgate Metals Ltd v London Borough of Islington [1996] Crim LR 334;

Perkins v States Housing Authority [1995] 20 GLJ 66

The Administration of Justice (Bailiwick of Guernsey) Law, 1991, as amended, Sections 6(1) and (2);

The Indictments (Guernsey) Law, 1950, as amended, Section 2;

The Magistrate's Court (Criminal Appeals) (Guernsey) Law 1988 as amended, Section 1(b);

The Protection of Offenders Law, 1929, Section 1(2)

The Criminal Procedure Rules, 2015;

The Magistrates' Courts Act, 1980, Sections 123(1) and (2)

DECISION

Introduction

1. This is a Prosecution (“A’s”) appeal under Section 1(b) of The Magistrate’s Court (Criminal Appeals) (Guernsey) Law, 1988 (“the Law”). The Judge of the Magistrate’s Court certified the following question for determination:

“... the extent in Guernsey to which 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.”

2. The question arises following the Respondent’s (“R’s”) acquittal on a charge of doing an act which had a tendency to pervert the course of justice. The relevant Act of Court is found at 1(a) of the bundle produced for the purposes of this appeal (“the bundle”). A charge of obstructing the Police was also dismissed, and is not the subject of appeal. The full charge with which this case is concerned reads as follows:

“THAT YOU, on 12 February 2017, with intent to pervert the course of Public Justice, did an act which had a tendency to pervert the course of Justice in that you took a mobile telephone to [address], knowing that Police Officers were searching for that mobile telephone in connection with an investigation into a criminal offence.”

3. There is a full transcript of the hearing, which extended over 3 days, in the bundle. The factual background is set out in the Prosecution opening at pages 1-3 of the transcript. Put briefly, the Police attended R’s family home to arrest her 17 year old son. It was necessary to seize all electronic devices and mobile phones to which he had access. The boy indicated that he had used an HTC phone which he thought was charging in his parents’ bedroom. Both parents were present at the time and made efforts to locate it. R stated she had tried to ring it, but it had gone to voicemail so was either switched off or out of battery. On her son’s arrest R agreed to go to the Police Station to act as an appropriate adult. She appeared there some 24 minutes after his arrival. On her own admission she had “diverted” (as the Prosecution put it) to her mother and step-father’s house and when there took the HTC phone inside. When questioned about the missing phone at the Police Station, R stated *“I don’t know where I had it last; last week probably”*. A search team was organised to go to the house and R made a call to her step-father. She then told the Inspector in charge, *“It looks like my mum’s got it”*. In interview, R stated it was in the foot-well of her car, not in the house where the Police were to be searching. The Prosecution case is summarized at page 2-G of the transcript. R it is suggested, took the HTC phone into her parents’ address in “full knowledge it was an item the Police wished to seize and did so in order to interfere with potential evidence against her son”. It did not matter whether it was in the foot-well of the car or not, as R took it to another location and continued to deny knowledge of it until disclosing its whereabouts.
4. R’s evidence was that the first time she saw the phone it was in the foot-well of her car, which was stopped in the driveway of her parents’ house (pp 165-166 of transcript). She picked both this and her handbag up and went into the house. She added that she asked if it could be charged, but was in an irrational state of panic. Furthermore, she was only concerned about her son when asked by the Police about the phone following her arrival at the Police-Station. When a search of her parents’ property was mentioned it *“rang the bell”* and R contacted her step-father and asked if she had brought the phone to be charged. He confirmed its presence there. At page 187 during the course of cross-examination, the judge asked the Prosecution whether he was right in assuming *“you are accepting that the phone was indeed in the foot-well or not?”*. The response was *“I have no reason to think otherwise, Sir”*. This was discussed further towards the end of Advocate Ferbrache’s closing submissions. There is dialogue at page 235 to the effect that R’s evidence was that this was the first time she had seen the telephone and the Judge observed, *“That was then what led me to question the basis upon which the Prosecution was putting its case. Yes”*. Then more specifically, at page 238, the wording of the perverting the course of justice charge is looked at. Crucially the Judge asked:

“... and the question that I asked of the Prosecutor is to how she was putting her case, is there not an argument she was already at [address].”

And, also importantly, on page 239:

“The wording is took a mobile phone to The Mulberry’s. She was already there and you are saying I should not differentiate between the car and the house in terms of taking it to [address].”

The Prosecutor responded:

“That positive action of taking it inside I would submit is taking it to.”

5. The Judge of the Magistrate’s Court gave a full and reasoned decision. For the purposes of this appeal the relevant part reads:

“The specific wording of the charge was that she took the phone to [address] with the intention of perverting the course of justice. Whilst she may have taken it inside for a nefarious purpose, in my view she was already at [address]. So again, in the wording of the charge, I consider I have no alternative but to find her not guilty of that matter too.”

Preliminary Points

6. The Guernsey procedure under the Law has some similarities with the appeal by way of Case Stated in England. The main one is that a question has to be formulated for the opinion of the Royal Court. In his skeleton argument on behalf of R, Advocate Ferbrache comments that R was not afforded the opportunity to comment on it with regard to its appropriateness (paragraph 3). In England the Criminal Procedure Rules, 2015 provide for a 14-day period for the parties to make representations on an application to state a case. Prosecution appeals from the Magistrate’s Court are, rightly, rare. It would be good practice in future for the parties to agree the question, and, if this were not possible, the Judge of the Magistrate’s Court to settle it having considered representations. Even before the 2015 Rules, it was not uncommon for the parties to disagree about the nature and content of the question in a draft Case Stated and for the Divisional Court to be made aware of that. The ultimate form of the question, must, of course, be a matter for the Judge of the Magistrate’s Court. In the present case no great harm ensued, but other future appeals under the Law may find this aspect important. Accordingly, it is good practice for the Appellant Prosecutor to circulate a draft question to the Respondent for any relevant comments.
7. At page 241 of the transcript, Judge McKerrell expresses concern that the phone had not been examined. He, with respect, very correctly goes on to say that the Police have a duty to pursue all reasonable lines of enquiry and thereafter consider carefully their disclosure obligations. That omission (together with the failure to have a search log) showed that the investigation was sub-standard. This is a serious case with a charge that could easily have ended-up with trial on indictment. Such errors are not acceptable. At the hearing of the appeal, Advocate Calderwood (who had not presented the Prosecution case at the trial), told the Court that he had caused the phone to be examined and that nothing inculpatory had been found. He was criticized for this and Advocate Ferbrache equated his observations with the ill-fated attempt to give evidence by Advocate in the celebrated case of Perkins v States Housing Authority (1995) 20 GLJ 66. But the situation there was quite different. Counsel had sought to introduce evidence to show that the Housing Authority had performed its statutory duty; but in this appeal Advocate Calderwood was fulfilling his duty as an officer of the Court in informing the Court that nothing adverse to R had been found; something which does not reflect upon R and is, in

reality, in her interest. The fact however remains that this should have been done for the trial, in the course of the investigation.

Observations

8. In this appeal the Royal Court is bound by the findings of fact made in the court below. In his decision Judge McKerrell was critical of A's account. At page 243-E one finds the following observations:

"I have considered the defendant's evidence carefully and I am satisfied that she has not told the whole truth."

And:

"In my assessment, as I have indicated, she had not discounted the possibility of there being something incriminating on the phone."

And, in conclusion, the words quoted in paragraph 5 above.

9. Advocate Calderwood referred in his oral submissions to "*hair-splitting arguments*" and indicated that "*criminal litigation is not a game*". This followed on from paragraph 18 of his Notice of Appeal (1(b) of the bundle) which states:

"In summary, it is respectfully submitted that Judge McKerrell erred in law by placing undue emphasis on specific words within the particulars of the offence (as contained within the charge) in circumstances where he otherwise found that the actions of the Respondent established the offence for which she was being tried."

In his authorities, Advocate Calderwood cited cases arising from trials on indictment and mentioned the provisions of Section 2 of The Indictments (Guernsey) Law, 1950, as amended. Advocate Ferbrache stood by his closing observations at the trial and distinguished between the words "to", as in the charge and "into". They have different meanings, he submitted, and one asks what did R do in connection with the specific wording of the charge? It was also submitted that the Prosecution had the opportunity to reflect on this and seek an amendment before the case was closed. This was not done.

10. Sections 6(1) and (2) of the Administration of Justice (Bailiwick of Guernsey) Law, 1991 as amended, is based on Sections 123(1) and (2) of the English Magistrates' Court Act, 1980. This is rather more to the point in the present circumstances than references to indictments. The form of words is wide at first glance, so one must have regard to the explanation given in relation to the English statute by Lord Widgery CJ in Garfield v Maddocks [1974] QB 7 at 12:

"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 the 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."

Further explanation was given in New Southgate Metals Ltd v London Borough of Islington [1996] Crim LR 334. There are three types of error which can occur. These can be summarized as:

- (i) a “fundamental” error that cannot be rescued by any appropriate and reasonable amendment;
- (ii) a “defect that is substantial enough to require amendment” (this is subject to the power to adjourn). If such an error is not corrected any conviction is at risk of being quashed by the Divisional Court; and
- (iii) an error “so trivial that no amendment is required”.

11. Advocate Ferbrache’s submission that the Prosecution had ample time to reflect and seek an amendment over the course of a 3-day trial is correct. No such application was made. In my judgment such an application, even well into the trial, might well have succeeded, with an adjournment being offered to the defence. There is a difference between “to” and “into” and a criminal charge must be construed strictly and narrowly. In the absence of amendment, the fact found that R was already at the house stands. As Advocate Ferbrache said, (page 238-E): “*That is the point. She was already there*”. This is further developed on the next page.

12. But that is not the whole of the story. As previously mentioned, the findings of fact made by the Magistrate’s Court stand. At page 243, E-F, the following findings need to be considered:

“In my assessment, as I have indicated, she had not discounted the possibility of there being something incriminating on the phone.”

And, more importantly:

“Whilst she may have taken it inside for a nefarious purpose, in my view she was already at [address].” (Emphasis supplied)

It was open to Judge McKerrell, had he so found, to have said that R “*did know or suspect there was something incriminating on the phone*” or, “*she did take it inside for a nefarious purpose*”. The findings made fall short of the level of certainty required to establish a serious criminal charge. A person who “may” have done something unlawful - or even more, by way of example, “is likely to” have done so, or “almost certainly did so” is entitled to acquittal on the criminal standard of proof.

13. It follows, therefore, that this appeal fails on 2 grounds:

- (i) the wording of the charge, no amendment having been sought; and
- (ii) despite findings that were adverse to R in a good deal of respects, the crucial element of being certain of R’s intentions was absent. These findings, it is emphasised, are not in dispute.

Conclusion and Afterword

14. The Prosecution’s appeal is therefore dismissed. At the opening of the oral hearing I made the observation that should A succeed I would remit the matter to myself sitting as the Magistrate’s Court and dismiss the charge under the Probation of Offenders Law, 1929, Section 1(2) on the grounds that considering the history of the case it would be inexpedient to inflict any punishment, or any other than a nominal punishment. This is because R has now suffered enough. The alleged offences took place in February, 2017, the trial was held in late November, 2017, and the appeal initiated in December of that year, being heard in March 2018. It is not in the public interest to impose any punishment in all the circumstances, had A’s appeal found

favour. With great respect, the question that had to be decided, whilst at first glance raising an important procedural point, fades away when Section 6 of the Law of 1991 is added to the mix. In my view (which is not binding), this case should now be allowed to fade into history.

15. Appeal Dismissed.

**J R Finch, O.B.E.,
Judge of the Royal Court**