

JERSEY / JUDGMENT

A, B and E v HM Attorney General

[2020] JRC 118 (19 June 2020)

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judgment

the commissioner: 1. This is a judgment in respect of an appeal against conviction pursuant to Article 17 of the Magistrate's Court (Miscellaneous Provisions) (Jersey) Law 1949 (the "1949 Law") by all three Appellants against the decision of the Assistant Magistrate on 12 th December, 2019, to convict them of charges brought under Article 35(1)(b) of the Children (Jersey) Law 2002 (the "Law"). The First Appellant was convicted as the principal offender and the Second and Third Appellants were convicted of having aided and abetted the First Appellant in the commission of the offences. The charges were brought in respect of two children aged 4 and 3, but were based on the same set of facts. Those facts essentially were that the Appellants with the two children crossed from Portbail on the adjacent coast of France to St Catherine's Bay in Jersey, a distance of 13 nautical miles on 2 nd July 2019 in a 3.2m inflatable boat. In respect of each child, the charge was framed as against the First Appellant in this way:- "On 2 nd July, 2019 at the location known as St Catherine's in the Parish of St Martin, the [First Appellant], having responsibility for a child Miss X under the age of 16 years, she intentionally or recklessly exposed to risk of harm the said child." 2. The second charge in respect of Miss X's brother was framed in the same way. An amendment was allowed at trial to describe the alleged offence as having been committed "in the territorial waters of Jersey". The Second and Third Appellants were charged with having aided and abetted the First Appellant to commit the substantive offences. 3. Suspended custodial sentences were imposed on the Appellants although each of them were held in custody for different periods of time on remand before trial. The appeal is brought against the convictions only and in the light of the Coronavirus pandemic has been dealt with by the Court on the papers with the consent of the Appellants and the Respondent. Joint contentions on the part of the Appellants have been filed, with answering contentions on the part of the Respondent. The Appellants have also filed short contentions in reply. This procedure replicates what would have happened had there been an oral hearing in that respect but there has been no public hearing. The Appellants have waived their Article 6 Convention rights to such a hearing but in the interests of transparency this judgement is to be published in full save that the names of the parties will be redacted as some protection for the children in the future. Test on appeal 4. Although in the joint contentions on the part of the Appellants, reference was made to the cases of Milho v AG

- [2000] JLR 363 and *Rushton v AG* [16 October 1989, Jersey Unreported] the more recent formulation of the Royal Court's approach when considering appeals against conviction from the Magistrate's Court is set out in *Graham v AG*
- [2013] (1) JLR 91, where there was a full discussion of the nature of the right of appeal. *Graham* has been referred to and followed in *AG v O'Neill*
- [2018] JRC 199, *Quinn v AG*
- [2018] JRC 183, *Querée v AG*
- [2018] JRC 014 and *Hopkins v AG*
- [2018] JRC 168 . 5. At paragraph 15 of *Graham*, having referred to the right of appeal in Article 20(3) of the Law, the Court said this:- "15 Article 17 does not itself give any indication as to the basis upon which an appeal from the decision of the Magistrate should be approached by the Royal Court. Nonetheless, it is clear that, if there has been some procedural defect before the Magistrate which is of sufficient significance, the Royal Court will interfere with the decision below; and it is also quite clear that the court occasionally directs that witnesses are heard before the Royal Court in relation to the appeal, as indeed we have done. Similarly, where there is an issue of law where the Royal Court is of the view that the Magistrate went wrong in a material way, the court will invariably interfere with the decision below. Where there is simply a complaint about the evidence that was given, the court's approach has been said on many occasions to be that set out in *Rushton v. Att. Gen.* (7), where the court said: "The court of course has on many occasions said that its duty in looking at an appeal on conviction from the Magistrate below is to examine the transcripts to see if there is evidence on which the Magistrate concerned could properly have come to the decision he did. If there was that evidence, then even though the court might not necessarily have come to the same decision, the court does not lightly interfere with it. The court has to be satisfied that there was insufficient evidence of the Magistrate to have come to the decision he did, or that he drew the wrong conclusions and inferences from the evidence before him."" 6. The Court went on to say:- "17 It is clear, therefore, that the Royal Court's approach to appeals from a decision of the Magistrate has historically been that it will not lightly interfere with a decision on the facts where the transcripts reveal that there was evidence on which the Magistrate could properly have come to the conclusion which he or she did. That approach is taken to give appropriate recognition to the principle that the Magistrate is in a better position than the Royal Court because he or she has had the advantage of seeing the witnesses give their evidence. Nonetheless, it is to be recalled that the terms of the statute give the Royal Court a wide discretion on appeal. In our judgment, there will occasionally be cases where the court is simply uncomfortable with what has taken place below. In England, the changes which were introduced by the Criminal Appeal Act 1968 removed the similar language as is in the Court of Appeal (Jersey) Law 1961 and instead permitted the Court of Appeal to allow an appeal against conviction if the court considered the decision below was under all the circumstances of

the case unsafe or unsatisfactory, as well as setting aside the decision on a ground of law or where there was a material irregularity in the trial. When this was considered in *R. v. Cooper* (4), the court said this ([1969] 1 Q. B. at 271): "[The shift to unsafe and unsatisfactory] means that in cases of this kind the court must in the end ask itself a subjective question, whether we are content to let the matter stand as it is, or whether there is not some lurking doubt in our minds which makes us wonder whether an injustice has been done. This is a reaction which may not be based strictly on the evidence as such; it is a reaction which can be produced by the general feel of the case as the court experiences it." There has from time to time been both judicial and academic criticism of the expression "lurking doubt," but the Court of Appeal in England has continued to refer to this test from time to time (see *R. v. Litchfield* (5) and *R. v. Benton* (3)). It was said that the "lurking doubt" test and an alternative formulation advanced in *R. v. Wellington* (6)-"whether we feel a reasoned and substantial unease about the finding of guilt"-are both acceptable and come to the same thing: "Was the conviction unsafe?" (2000 WL 491414, at paras. 28-29). We consider that the tests as set out in *Rushton v. Att. Gen.* (7) will, absent any other considerations, be sufficient in most cases to lead to an appeal being refused where there was evidence upon which the Magistrate could reasonably reach the conclusion he or she did. However, the qualification in the *Rushton* case, that the court would not lightly intervene where those were the facts, is an important qualification because it chimes with the lurking doubt/sense of unease approach which has been advanced from time to time in the English courts on an admittedly different statutory test."

7. As indicated in *Graham*, to say that the Court will not lightly intervene is to say that sometimes it will intervene, even though there was evidence on which the Magistrate could reasonably have reached the conclusion s/he did. 8. We have applied these principles to the present case. Crown Advocate Baglin referred to the Privy Council decision in *Attorney General v O'Brien* [2006 JLR 133]. He contended that this court had a more limited jurisdiction on appeal akin to that of an appeal from the Royal Court to the Court of Appeal and he emphasised the need for an appellate court not to usurp the function of the trial court. We accept entirely that principle, which is indeed reflected in many of the appeal judgements of this court from the Magistrate's Court, but it must be noted that the right of appeal under the Court of Appeal (Jersey) Law 1961 is not in the same terms as the right of appeal under Article 17 of the Magistrate's Court (Miscellaneous Provisions) (Jersey) Law 1949. Accordingly we have applied the established tests in *Graham* to this appeal. The evidence 9. It is fair to say that the facts were not seriously in dispute in the Court below - the real dispute turned on the interpretation of them. For the Crown, the Court heard from Mr James Ransom, a landscape gardener with over twenty years' experience with the RNLI. He was not an expert witness and thus not able to give opinion evidence. Mr Ransom watched the boat come into shore at Bel Val and considered it suspicious, making a telephone call to advise the coast guard of these suspicions. He also said that he thought that the boat was entering quite choppy waters at the end of St Catherine's breakwater. He was not asked about, and did not mention, the tidal rip which is often experienced at the end of the breakwater, especially when the wind is against the

tide. The Crown also called Mr Jamie Dollimore, the Coastguard and Vessel Traffic Services Manager at Jersey Coastguard; Captain Stanley Richard dit Leschery, Maritime Standards Manager for Ports of Jersey, and PC Martin Davies, the officer in charge of the case. Mr Dollimore and Captain Richard dit Leschery were called as expert witnesses. For the defence, both the First and Second Appellants gave evidence. 10. Some time was spent by the prosecution in eliciting evidence that the Appellants were landing illegally in Jersey and that the First Appellant gave incorrect information to the port authorities when challenged on entry. The First Appellant was in breach of an order from a Canadian court requiring that she did not remove her eldest child from the jurisdiction of Vancouver Island and her lack of candour was a result of an Interpol notice having been issued in respect of her and her daughter. Some evidence was given as to the reason for arriving in Jersey which was to enable the family to make their way from France back to England, as it were, under the radar of the authorities. We mention this evidence immediately in order to dispense with it. We have no reason to doubt the evidence given by the First and Second Appellants at trial. The clandestine nature of the voyage was absolutely irrelevant to the charges which were laid against the Appellants. Its only conceivable relevance would have been to the mental element of recklessness, and for the reasons which we give later, it was not relevant to that. 11. The First and Second Appellants gave evidence as to their boating experience and the preparations which they made for the journey. It is fair to say that they were experienced boaters. The Second Appellant gave evidence as to how they came to make this journey. Whilst living in Spain the family decided to move to the UK so that the children could be educated there. He is British with dual nationality having moved to Canada in 2002. They decided that crossing by boat from Normandy to Jersey and then taking a ferry to the UK was an ideal way of the First Appellant and her children moving to the UK under the radar of the authorities. In about October 2018, together with the Third Appellant, he came to Jersey for three days, visiting the east coast to look at places where they could land safely, looking at the coast at high tide and low tide and checking access to roads, buses, hotels and ferries. The family moved from Spain to Portbail in January 2019 in preparation for the voyage. The Second Appellant described how the family looked at all the ports and beaches around Portbail in France, and they looked at the tides. They planned the navigation in detail by looking at relevant navigation charts. They decided to obtain a very shallow draft boat, as the prudent choice of vessel, given the number of hazards and rocks that were apparent from the charts; and they considered the tidal range to give the maximum amount of clearance over the hazards in question. They acquired the boat new in the spring of 2019. This was a Honwave inflatable with a length overall of 3.2 metres. The boat had a CE marking meaning that the craft and its components complied with all the essential requirements and assessment procedures provided by European Community law. The marking classified the boat as design Category C, suitable for 4 adult persons, a maximum load of 735 Kg, maximum engine power of 15 hp and specified the working pressure of the inflatable tubes. There are four categories under the directive: namely, A OCEAN, B OFFSHORE, C INSHORE and D SHELTERED WATERS. Thus the craft chosen by the Appellants was not designed for offshore voyages, but it was not restricted

to use in sheltered waters only. Category C boats are designed "for voyages in coastal waters, large bays, estuaries, lakes and rivers where conditions up to, and including, wind force 6 and significant wave heights up to, and including, 2m may be experienced". This compares with Category B where the vessel is designed for offshore voyages in conditions at wind force 8 and wave heights of up to 4m. 12. They bought the outboard engine at the same time. They selected the highest capacity engine that was recommended for the boat, a 15 hp Honda engine which was described as very reliable, indeed well known for its high reliability. The Second Appellant also took the opportunity of running the engine in. The particular craft which was chosen was rugged, with five air chambers, although the chances of it having a puncture were described as low. It came with oars, puncture repair kits, spare pull cords for the starter, and the Appellants chose the air V-floor version to ensure "maximum stability, effortless directional agility, responsive helm balance and increased buoyancy". Once the boat had been inflated, they checked the pressure on a pressure gauge supplied with the boat and all the chambers were at the correct pressure, verified before they left. The Second Appellant described how he estimated the load that they would be carrying, with the engine and people on board and the equipment - this came to 300 kilograms, and the boat was capable of carrying 735 kilograms. In the running in period of approximately eight hours, the Second and Third Appellants checked the fuel consumption, how the engine performed and how the boat performed, obtaining familiarity with the engine and with the boat. 13. The Appellants also obtained a Garmin GPS Model 73, which was secured by a lanyard around the neck of the First Appellant. This GPS was designed for marine use and is programmed to enable the user to navigate to a destination at sea. The First Appellant was familiar with the use of the Garmin GPS from her own boating experience. She had discussed which GPS to buy with her parents. 14. The Second Appellant gave evidence that they chose a boat that could comfortably take three adults and two children. He reasoned that, as the boat was suitable for four adults, it could satisfactorily accommodate the family. He sat on one side, his daughter on the other and his wife on the cross seat. The children sat on the floor between the legs of the First and Third Appellants respectively. He steered the boat and operated the engine. The First Appellant operated the GPS. 15. The Appellants ensured that there were suitable life jackets for the children, and they had flotation devices for the three adults. There was no VHF radio, but they had two mobile telephones in waterproof coverings, and they had verified that there was telephone coverage from Orange and Jersey Telecom across the entire journey. 16. The Appellants gave evidence that they checked the tide timetable, and the weather forecast. The wind was blowing from the north-east at force 2 to 3, and the weather pattern was settled. The sea was slight and the visibility was good. They plotted their course on the GPS that took them directly from a waypoint in the open sea off the entrance to Portbail to a waypoint off the St Catherine's breakwater at the entrance to the bay. This route was to the south of the Ecrehous reef, which accordingly was not a hazard. They had food and water on board, and they had calculated the amount of fuel needed for the trip - the engine would use approximately 4 litres of fuel an hour and they ensured that the fuel tank was full to its capacity of 12 litres. As the journey took about an hour, there

were ample reserves of fuel for the voyage. 17. The First and Second Appellants said in evidence - as the Third Appellant said in her police interview - that they would never have undertaken the voyage if they had thought there was a risk of serious harm to the children. 18. None of this evidence given by the First and Second Appellants was significantly challenged by the Prosecution. 19. The two witnesses, Mr Dollimore and Captain Richard dit Leschery, were called as experts. Mr Dollimore, as Vessel Traffic Services Manager, controls the commercial shipping movements within the Port of St Helier. He made a number of statements. In the first of those statements, he explained that he had been on duty on the morning of 2 nd July and received notification from his control room of the report from Mr Ransom of a suspicious landing in St Catherine's Bay. He instructed a team member to notify Police and Customs. He then went on to give his professional opinion that the vessel was not safe or appropriate to be used for the alleged journey with the number and age of persons on board. This opinion was based on the photographs of the boat and the adult floatation devices in the compound handed to him by the police officer who requested the statement. He concluded that the children had been placed at a significant risk of harm by being taken on the journey in question. Unfortunately it is clear that he was given incorrect information for example as to the life jackets the children were wearing when he opined that those they were wearing were unsuitable. His second statement qualified the opinions which he had expressed in his first statement. He conceded that the children had suitable lifejackets and he asserted that conditions might have been uncomfortable; and that it would have been better to have had a VHF. He does not seem to have been informed of the GPS for he does not mention it in his statement. He expressed no view in this statement about the safety of the journey. By the time he made his third statement, however, he had firmed up again on the safety of the journey in this craft. He gave three reasons: first, he contended that a 3.5m craft is not suitable for open water operations and more suited to be used within one nautical mile of the shore or as a tender to a larger vessel. Second, that the vessel was not fitted with any navigation or communications equipment and totally reliant on the use of mobile phones should an emergency arise. Third, that wind and tidal conditions on this stretch of water can pose considerable risk to a 3.5m vessel and its occupants, particularly without the knowledge, voyage planning and navigation / communications equipment. He did not mention the EU directive design category of the boat in this third statement, although he had set it out in his first two statements. The "one mile" opinion is not supported by any of the relevant paperwork neither under the Directive, which merely uses the expression "coastal waters", nor in anything supplied by the manufacturer. He did not explain why he thought this was the maximum distance this boat should go from the shore. In cross examination, he did not consider the fact that the Appellants had secured insurance cover for the boat for twelve miles offshore to be relevant, but he agreed that a direct route between Portbail and St Catherine's would be fourteen nautical miles, with the median point therefore approximately seven nautical miles. By this time he was aware that there had been a GPS available to the Appellants on the crossing but he had not seen it and would not comment on its suitability. This might be thought to undermine his second and

third reasons for his opinion as to safety. Although retained as an expert to express a view on the safety of the journey, he had not examined either the boat or its equipment. He was unaware of the voyage planning that had taken place, and he made no comment about the reserves of fuel or the condition of the outboard engine (he did not regard himself as an expert on marine engines), and he gave no evidence about the shipping forecast issued that morning by Jersey Met for the area. 20. At all events, although his witness statements do not give the reader much confidence, the summary of Mr Dollimore's evidence is that the undertaking of this journey on 2 nd July, 2019, put the occupants of the boat at significant risk of danger, that danger arising primarily from the size of the vessel. 21. Before leaving the evidence of Mr Dollimore, we mention in passing a matter which arose during the course of his evidence. Advocate Tremoceiro indicated to the Assistant Magistrate that a discussion in the absence of the witness, involving counsel and the Court, would be necessary. That discussion appears to have focussed upon communications between the officer in charge and the witness. Entirely appropriately, the Assistant Magistrate agreed that the discussions should take place; but unfortunately the solution adopted was that the Assistant Magistrate and counsel retired into Chambers to have that discussion. The result is that there is no record of what was said and one can contemplate that there might be circumstances when this would be relevant to an appeal. However, if this procedure continues to be followed, there will be no transcript available to the appellate court. The better course is for the witness and the officer in charge to be required to leave court in order that the relevant submissions to the court can be made by counsel in the usual way, and be recorded. 22. Captain Richard dit Leschery is the Maritime Standards Manager for the Ports of Jersey, and one of three harbour pilots. He is Jersey's principal maritime accident investigator, and one of three Port State Control Inspectors appointed to enforce maritime legislation standards. He acts as a fishing vessel and commercial vessel inspector and is one of three current pilots that bring vessels into St. Helier. Maritime safety "is pretty much my entire role". Captain Richard Dit Leschery has forty-two years seagoing experience and effectively thirty years in command. 23. The evidence he gave was that it was essential to plan a voyage appropriately in order that it could be conducted safely. It was necessary to take into consideration the type of vessel, the weather conditions, the route and the safety precautions needed both for the passengers and the vessel. He criticised the fact that there was only one engine on the craft in question in this case, and the absence of any guard around the propeller. He pointed out that if the engine failed, the vessel was subject to wind and tide, and there would be no control except for whatever paddles or oars might be carried. In his view, this was an inflatable designed for operating with a beach launch from a trailer to a larger vessel such as a yacht - if it were a vessel applying to be operated commercially, then this craft would be limited to a mile from its point of launch. He had not inspected the vessel which the Appellants had used, but he pointed out that inflatable vessels were liable to be punctured and he speculated that the chambers were not independent of each other. He thought there was little distance between the top of the vessel and the waterline. (This was strongly disputed by the Second Appellant). He criticised the absence of an effective

means of navigation or radio communications and pointed out that a message from a mobile telephone that there was a problem was of little use if those receiving the message did not know where the vessel was, whereas with a VHF communication, one could take geographical points for a triangulation. He said that "I cannot envisage any circumstances in which I would have chosen to make a voyage in that vessel over that route". When pressed about the boat itself, he agreed he had not physically examined it, and he was not aware of the actual model of the engine which was being used. He agreed the boat hull appeared to be in reasonable condition for a boat of its size, and when he was questioned about European directives in relation to the boat types, he answered that he was aware of them, and he asserted that design category C had no direct relevance as it is based on the EU Pleasure Vessel Directive which has no application in Jersey. He did not consider the fact that insurers were prepared to cover the vessel for up to twelve miles from the shore to be relevant. When cross examined about the triangulation by VHF radio, he accepted that he had overlooked that the use of GPS equipment would provide latitude and longitude coordinates. 24. We do not think it is unfair to the witness to say that he assessed the question of safety very much from a commercial maritime perspective and that he focussed on what could go wrong in theory. He did not have sufficient detailed knowledge of the planning undertaken, the equipment available or the weather conditions and visibility to make any assessment of what the particular risks were on that particular day. Ultimately his evidence was very much the basis upon which the Assistant Magistrate reached his conclusions. Grounds of appeal 25. The grounds of appeal common to all three Appellants were that the learned Assistant Magistrate:- (i) Erred in failing to recuse himself from sitting in the trial. (ii) Erred in allowing the evidence of a second prosecution expert, Captain Richard dit Leschery to be adduced. (iii) Erred in failing to order disclosure to the defence of documentation relating to the evidence of the first prosecution expert, Jamie Dollimore. (iv) Had insufficient evidence upon which he could have properly reached a guilty verdict. (v) Took into account matters which he should not have taken into account and failed to take into account matters which he should have taken into account. (vi) Drew wrong conclusions and inferences from the evidence. (vii) Erred in law as to the mens rea applicable to the offence. The procedure before the Magistrate's Court 26. The Appellants were first presented before the Magistrate's Court on 4th July, 2019, when they appeared before the Relief Magistrate Advocate Fitz. At that time, the First Appellant was the subject of a provisional arrest warrant under Article 10 of the Extradition (Jersey) Law 2004. Essentially the charges in respect of which extradition were sought related to alleged abduction of the elder child from Canada and the disobedience of court orders. The application was adjourned for 28 days and there was no bail application made, the First Appellant being remanded in custody. The Relief Magistrate then went on to deal with the separate charges against all three Appellants. All pleaded guilty, on the basis of recklessness, namely of failure properly to evaluate the risk, but otherwise the defence which was substantively advanced at trial was recited by the duty advocate on behalf of the First Appellant as mitigation. The lengthy address was made and guilty plea entered because the First Appellant wanted to put the criminal

matter behind her quickly and focus her energies on the extradition proceedings and the fact that the Minister for Health and Social Services had presented an application for a care order and the two children had been taken into foster care. The Relief Magistrate was clearly concerned at the guilty plea being entered - she expressed herself this way:- "If it is being suggested that they had appropriate life jackets and the sea was calm and the wind was light and there were no incidents it is hard to understand the basis of the guilty plea. So I think we need to address that further. Do we know what the weather conditions were? Do we know the force of the wind?" 27. The prosecutor innocently gave information to the Relief Magistrate which was factually incorrect in a number of respects. Following an adjournment, the Relief Magistrate considered that this was a serious matter, which potentially crossed the custody threshold and in those circumstances the Court considered that it needed a great deal more information. In the event, the case was remanded for one week with the First Appellant in custody and her parents granted bail. 28. There was a hearing before the Assistant Magistrate on 11 th July. At that time it was clearly an interim matter, because sentencing had been fixed for 8 th August and a social enquiry report was awaited. The Assistant Magistrate gave the Second and Third Appellants a quick summary of the relevant bail conditions and the case was remanded until 8 th August. 29. The Relief Magistrate Advocate Fitz sat again on 8 th August to hear a prosecution application for an adjournment, pending receipt of further information from the Canadian authorities. Having heard counsel, the Relief Magistrate adjourned the matter until 2:30 that afternoon and, when it was called again at that time, the hearing was conducted before the Magistrate Mrs Shaw. In his introductory remarks, Mr Crowder, on behalf of the Attorney General said this:- "There are two-fold applications in this Ma'am. Firstly, the criminal proceedings, if I can refer to them as such. The defendants entered guilty pleas to all the matters before the Court on the first hearing. In an effort to clarify exactly the harm, or potential harm I asked for a further statement from the coastguard manager, Mr Dollimore. It is fair to say that when he submitted that second statement, it took a number of the pillars away, if I can use that phrase, from the child neglect offence. In effect, and I accept this is the Crown's case and my learned friends don't necessarily agree with me, the child neglect as far as the prosecution put the case is now to the point where they took an open water crossing on a boat not rated for that crossing. The weather remained within the bounds of the boat, albeit the type of crossing wasn't. As we all know, weather changes, and if it had, and it's that risk that the Crown puts its case - if it had

- the boat was not at all suitable. And danger could have been the consequence So Mr Dollimore did change his position for example in relation to lifejackets which it is fair to say the three defendants pointed out on the first day of the hearing. They were adamant that the life jackets were suitable and it's fair to say that Mr Dollimore would now agree with them." 30. Mr Crowder indicated that the Crown was on notice that there would be an application to change the pleas to the child neglect charges, and in relation to extradition, he said that the Canadian authorities did not oppose the granting of bail. He also advised the Court that the main extradition offence had fallen away, because Jersey legislation was sufficiently

different from the offence in British Columbia and the dual criminality requirement was not therefore met. 31. Having heard counsel, the Magistrate permitted the guilty pleas to be vacated in relation to the child neglect charges. The Magistrate indicated that she would adjourn the matter for a week, and the First Appellant was remanded in custody, with the bail application to be reconsidered at the adjournment. At that time she anticipated that security would be in place to support the parents' surety for their daughter's appearance in court, and that the outstanding passports could also be deposited with the Court. She indicated that it would be a matter for the Magistrate sitting on the next occasion but that apart from security and the passports, the Court would be likely to impose stringent conditions such as requiring an address, curfew, daily reporting to the police, obligations not to leave or attempt to leave the Island, and not to apply for any travel documents or make travel arrangements nor to possess any photocopies of any photographic identification and not to apply for that identification. 32. From this moment, the Relief Magistrate had no further part to play in the proceedings, and the Magistrate sat only once, on 10th October, 2019, to deal with an adjournment of the trial by consent, and a variation of a condition of bail in respect of the First Appellant. The hearing on 10th October before the Magistrate is otherwise only of interest because, in answer to a question from the Magistrate as to whether there would be an expert witness at trial, Mr Crowder, on behalf of the Attorney General, said that "The Coastguard Manager is the only witness that the prosecution are calling." 33. Apart from the hearings before the Relief Magistrate and the Magistrate which we have mentioned, all bail applications, recusal, procedural motions, trial and sentencing hearings were before the Assistant Magistrate. First ground of appeal 34. We turn now to the first ground of appeal, which is that the Assistant Magistrate erred in failing to recuse himself from sitting at trial. 35. In *Bisson v The Minister for Infrastructure*

- [2019] JCA 181, Lord Anderson KBE, sitting as a single judge of the Court of Appeal, said this:- "A judge should not hear a case if he or she is actually or apparently biased against one of the parties to it. The legal test for apparent bias is well settled. It is whether "the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased" (*Porter v Magill*
- [2002] 2 AC 357, per Lord Hope at para 103 ... As explained in *Otkritie International Investment Management and others v Urumov*
- [2014] EWCA Civ 1315, per Longmore LJ at paragraph 1: "The concept of bias extends to any real possibility that a judge would approach a case with a closed mind or, indeed, with anything other than an objective view: a real possibility in other words that he may have pre-judged the case." 36. Lord Anderson went on to consider the law in relation to recusal applications where the judge sought to be recused had already sat and expressed views in the course of the proceedings. In *Locabail (UK) Limited v Bayfield Properties*
- [2000] QB 451, the English Court of Appeal said:- "[25] The mere fact that a judge, earlier in the same case or in a previous case, had commented adversely on a party or witness, or found the evidence of a party or witness to be unreliable, would not without more found a

sustainable objection. In most cases, we think, the answer, one way or the other, will be obvious. But if in any case there is real ground for doubt, that doubt should be resolved in favour of recusal. We repeat: every application must be decided on the facts and circumstances of the individual case..." 37. Lord Anderson also referred to the English Court of Appeal judgment in *Dobbs v Triodos Bank NV*

[2005] EWCA Civ 468 , at paragraph 7:- "It is always tempting for a judge against whom criticisms are made to say that he would prefer not to hear further proceedings in which the critic is involved. It is tempting to take that course because the judge will know that the critic is likely to go away with a sense of grievance if the decision goes against him. Rightly or wrongly, a litigant who does not have confidence in the judge who hears his case will feel that, if he loses, he has in some way been discriminated against. But it is important for a judge to resist the temptation to recuse himself simply because it would be more comfortable to do so. The reason is this. If the judges were to recuse themselves whenever a litigant - whether it be a represented litigant or a litigant in person - criticised them (which sometimes happens not infrequently) we would soon reach the position in which litigants were able to select judges to hear their cases simply by criticising all the judges that they did not want to hear their cases. It would be easy for a litigant to produce a situation in which a judge felt obliged to recuse himself simply because he had been criticised - whether that criticism was justified or not." 38. Referring to that passage, also referred to with approval in *AB v HM Attorney General*

[2020] JCA 094 , Lord Anderson said that:- "[it] applies with at least the same force in the relatively small jurisdiction of Jersey, where an over-scrupulous approach to recusal could cause serious problems for the administration of justice." 39. This comment chimes with a comment of Southwell JA in *The Greffier of the States v Les Pas Holdings Limited*, the *Waterfront Enterprise Board Intervenor* (Jersey Unreported 1998/132) when he said in relation to an allegation of bias raised by *Les Pas Holdings Limited*:- "But, having regard to the written evidence which this Court has seen, I think it right to make these observations of general import on the developing habit of making *récusation* applications: (1) Those who live and work in Jersey have to accept that the administration of justice depends to a great extent on the two senior Judges, the Bailiff and the Deputy Bailiff. (2) No application for *récusation* should be made without strong grounds to support it, and no such application should be granted unless such strong grounds are clearly established. (3) Included in the affidavits filed on behalf of *Les Pas* were allegations that members of the Court shook their heads in disagreement with things said by Advocate Falle, and nodded their heads in agreement with things said by the Solicitor General. It is entirely normal, particularly for a non-lawyer Jurat, to indicate by movements of the head whether a point is or is not considered to be a good one. That the application for *récusation* was in part based on such a frivolous ground is to be regretted. (4) In future, if applications based on such grounds are made, they should be refused, and if the circumstances are appropriate, indemnity costs should be ordered against the applicant." 40. The *Les Pas Holdings* case predates the more recent authorities cited by Lord Anderson JA, but we cite it because, in

a jurisdiction where there are a limited number of magistrates able to sit and a limited number of local judges able to sit in the Royal Court, it is important not to reach a stage where, in effect, a litigant is able to choose his or her judge. This has the consequence that recusal applications should be carefully considered against the tests summarised in *Bisson v The Minister for Infrastructure* [supra]. 41. In the present case, a recusal application was made to the Assistant Magistrate on 4 th November, 2019. The possibility of that application had been foreshadowed by submissions made to the Assistant Magistrate on 24 th September, both by Advocate Dale and by Advocate Tremoceiro. In summary, it was asserted that the Assistant Magistrate knew too much about the facts which had been alleged in the past - he knew about the prospective extradition, and he had dealt with many of the bail applications. Having heard the submissions in September, the Assistant Magistrate indicated that a formal recusal application would have to be brought, if that was the wish of the defendants, and that indeed did take place in November. 42. When the formal recusal application was made, the thrust of it was slightly different. It was suggested that in dealing with a bail application, the Court imposed stricter conditions in relation to the First Appellant than it had imposed in relation to the Second and Third Appellants, notwithstanding that by that stage all the extradition proceedings had been dropped and the prosecution were not seeking strict bail conditions. Advocate Tremoceiro submitted that that showed the Assistant Magistrate had already formed a view on the seriousness of the case and the strength of the evidence. Furthermore, although the Second and Third Appellants had adhered to their bail conditions for over 2 months, had not reoffended and had attended court when required, the Assistant Magistrate then of his own initiative changed their conditions of bail to impose similarly strict reporting conditions, a curfew and prohibitions from attending a number of locations in Jersey. When asked by the Assistant Magistrate how it was that a fair minded and informed observer could think that he might be biased against the Appellants at trial if he had only carried out his functions as the law required, Advocate Tremoceiro submitted that the prosecution, in possession of all the evidence, did not object to bail and did not seek the imposition of any conditions. 43. Later in the recusal hearing, the Assistant Magistrate asked whether the well informed observer would not have been influenced by the full bail history, showing that on a number of occasions, he had relaxed the bail conditions. Advocate Tremoceiro responded that "The fact that you perhaps are bringing them back to what they should have been, now three months ago, does not in any way detract from my submissions." 44. When giving his decision, the Assistant Magistrate said that he made his various decisions on bail applying the Criminal Procedure (Bail) Law 2017 (the "Bail Law") on every occasion. He had considered that the granting of bail to the First Appellant did change the risk profile in relation to all the Appellants. Over time that risk profile had changed and he had allowed various relaxations to these conditions. He indicated that whether the prosecution sought any particular conditions or not was wholly irrelevant. The responsibility for the decision as to bail was that of the Magistrate, and the Magistrate was governed by the Bail Law. He concluded:- "The decision that must be made at trial is whether any of the defendants

intentionally or recklessly exposed either child to a risk of harm. Applying the well settled test, I ask whether the fair minded and informed observer, having considered the facts, would conclude that there was a real possibility that I was biased. Put that into context, and my numerous dealings with bail for these defendants, I have no hesitation in rejecting this application. All three of them can rest assured that the presumption of innocence applies. The prosecution must prove their case to the high criminal standard. I shall determine the relevant decisions in a wholly impartial manner." 45. The real basis of the Appellants' complaints in the recusal application turn on the Assistant Magistrate's handling of the bail proceedings on 12 th August 2019. The Court has read carefully the transcripts both of that hearing and of the earlier hearing before the Magistrate Mrs Shaw on 8 th August, 2019. 46. While the Assistant Magistrate may have adopted a more interventionist approach to questions of bail than is sometimes the case, his judgments show that he was rational in his analysis even though as will be seen we consider he applied the wrong test on mens rea , and even though we have our own concerns about the expert evidence which he accepted. In the circumstances we consider the Locabail test is not met and he was right not to recuse himself; and there is no merit in the criticisms of him in this respect. Accordingly we reject this ground of appeal. Second ground of appeal - evidence of Captain Richard dit Leschery 47. We have referred already to the prosecution submission on 10 th October, 2019, that Mr Dollimore would be the only prosecution witness. Captain Richard dit Leschery was not put forward as an expert witness until relatively late in the proceedings - on 7 th November 2019. The Appellants objected to the admission of this evidence, both in email communications between counsel on 20 th November and as later developed at the hearing in court in the afternoon on 20 th November, the day before the commencement of the trial. Essentially, three objections were advanced:- (i) The overriding objective in criminal proceedings, set out in Part 2 of the Criminal Procedure (Jersey) Law 2018 militates against the multiplicity of experts in respect of each discipline. (ii) Admission of the evidence also offended against the principle of equality of arms which was part of the overriding objective. (iii) Admitting the evidence would extend the trial beyond the time originally estimated for its conclusion. 48. At the conclusion of the hearing on 20 th November, the Assistant Magistrate said this:- "Well it is 5.10pm now and I don't, I'm not sure if we have the staffing support any later than pretty much now. I'm going to review, these are obviously expert witnesses and therefore there is no issue about contamination of evidence by my seeing them. There are two issues, in terms of the two bites of one cherry argument, which I can only see by looking at what Captain dit Leschery says and if you just forward that to me. I'll assess the question of Mr Dollimore's position at the same time. I do not want to lose the trial date tomorrow and I don't want to, either in not starting or in starting and then having to adjourn straight away. So I'll review the statements and the first thing we'll deal with at 10 o'clock tomorrow is my decision on that on the defence application." 49. It is clear therefore that at the conclusion of the hearing on 20 th November, the Assistant Magistrate had reserved his position as to whether both experts should be permitted to give evidence. By an email to counsel at 18:39 on 20 th November, 2019, the Assistant

Magistrate indicated that:- "1. The expertise of Captain Richard dit Leschery does not materially differ from that of Mr Dollimore and his opinion does not materially add to that of Mr Dollimore - he is thus not required and may be excused attendance tomorrow. 2. Whilst Mr Dollimore is not specific as to the source of certain pieces of information, this can be addressed in cross-examination and I do not think that the defence will be in any way prejudiced in that regard." 50. The following morning, Mr Crowder asked whether he was precluded from calling a specific witness. The Assistant Magistrate responded:- "I did not direct, the Court, if the evidence is relevant and admissible, it's not for the Court to refuse to hear evidence. The argument Advocate Tremoceiro made yesterday afternoon about, and I use my expression of 'more than one bite of the cherry' in terms of the areas of expertise of those witnesses, they're not identical, but they overlap to a very large measure and the ground that they covered in their statements, there was a good degree of overlap. I think it's best that you start and you can see how you wish to proceed as the matter proceeds." 51. When Advocate Dale later complained that she was not clear as to which witnesses were being called because there was currently a ruling saying there was to be only one [expert], the Assistant Magistrate said this:- "I said I didn't think Captain dit Leschery's evidence was needed and that he could be excused. It was not 'you cannot call him' because I do not have the power, so where the evidence is relevant and admissible." 52. It was therefore on that basis that the Crown opened the evidence and in fact called both Mr Dollimore and Captain Richard dit Leschery. The complaint which is now made is that the Assistant Magistrate had a discretion to exclude the evidence of Captain Richard dit Leschery under Article 76 of the Police Procedures and Criminal Evidence (Jersey) Law 2003 ("PPCE"), and he did not address his mind to the use of such a discretion. Accordingly, it was said that he erred in that respect. It was of particular significance in the present case because when the Assistant Magistrate gave his decision, it is clear that he placed substantial weight on the evidence which Captain Richard dit Leschery had given at trial. 53. The Court has carefully considered the complaints which have been made, with which we have some sympathy. Captain Richard dit Leschery's evidence came forward at a very late stage when the Appellants had the difficult choice of applying again to adjourn a prosecution which had been hanging over their heads for months or proceeding without seeking their own expert evidence. The Assistant Magistrate seems to have given the impression in advance that the evidence added little to the case but in fact he relied heavily on it. He was not reminded about his power to exclude evidence under Article 76 of PPCE and he does not seem to have considered that course. By itself this ground might not have been enough for the appeal to succeed, but it adds to unease about the trial process. Failure to order disclosure in relation to Mr Dollimore's statements 54. In the third ground of appeal, the Appellants assert that the Assistant Magistrate erred by failing to order disclosure to the defence of documentation relating to the evidence of the first prosecution expert, Mr Jamie Dollimore. An application for that disclosure was made on 20 th November, 2019. The scope of the application is said to be that the prosecution should be ordered to provide the defence with written information by way of witness statements in respect of the sources of information provided to Mr Dollimore. As Mr

Dollimore was an expert witness, the contention was that the defence were entitled to see all the witness statements providing him with the facts upon which his expert opinion evidence would be provided. 55. The Appellants furthermore argue that Mr Dollimore did not comply with his duty as an expert witness because he did not disclose any unused material in relation to his expert opinion. This was of particular significance in the present case because he made three statements - one on 2 nd July, 2019, a second on 24th July, 2019 and a third on 3rd September, 2019. The first witness statement contained a number of factual errors. 56. When the Assistant Magistrate dismissed this application, he said this:- "Whilst Mr Dollimore is not specific as to the source of certain pieces of information, this can be addressed in cross-examination and I do not think that the defence will be in any way prejudiced in that regard." 57. Notification of that part of his decision had also taken place in the email of 20 th November, 2019, referred to at paragraph 49 above. In his contentions, the Crown Advocate does not address these points but he does concede that at the time the Appellants took their decision as to whether to call expert evidence, the only prosecution evidence was that of Mr Dollimore. 58. Criminal trials do not take place by ambush. The prosecution is required to disclose its primary case to a defendant, and where the evidence of an expert is to be advanced, to give adequate notice of it so that the defendant knows the case s/he has to meet. Nonetheless, the remedy for a defendant taken by surprise in this way is generally to apply for an adjournment. That is not always a desirable course, but in this case that option was not explored. Our conclusions on this ground of appeal are that again there is merit in the criticisms raised by the Appellants. The disclosure objections are particularly relevant because there were a number of criticisms of Mr Dollimore's substantive evidence, which we also consider have some merit as set out later in this judgment. The charges - the ingredients of the offence 59. The charges under appeal were brought under Article 35(1)(b) of the Law, but for the purposes of construing this Article, it is appropriate to set out the whole Article so that 35(1)(b) can be seen in context. Article 35 provides:- "Causing harm to or neglecting children under 16 (1) If any person who has responsibility for a child under the age of 16 intentionally or recklessly - (a) causes any harm to that child; (b) exposes the child to a risk of harm; or (c) neglects the child in a manner likely to cause the child harm, the person shall be guilty of an offence and liable to imprisonment for a term of 10 years and to a fine. (2) For the purposes of this Article - (a) a person with responsibility for a child shall be deemed to have neglected the child in a manner likely to cause the child harm if he or she has failed to provide, or procure the provision of, adequate food, clothing, medical aid or lodging for the child; and (b) where it is proved that the death of a child under the age of 3 years was caused by suffocation (other than as a result of disease or the presence of a foreign body in that child's throat or air passages) while that child was in bed with some other person over the age of 16 years who went to bed under the influence of intoxicating liquor or drugs, that other person shall be deemed to have neglected the child in a manner likely to cause the child harm. (3) A person may be convicted of an offence under this Article notwithstanding - (a) that harm or the likelihood of harm was obviated by the action of another person; or (b) that the child in

question has died. (4) If, on the trial of any person on a charge of infanticide or manslaughter of a child under the age of 16 for whom he or she had responsibility, the court or the jury as the case may be, is of the opinion that the person was not guilty of the offence charged but was guilty of an offence under this Article, the person may be found guilty of such an offence and shall be liable to be sentenced accordingly. (5) ... (6) For the purposes of this Article - (a) any person who has parental responsibility for a child or is otherwise legally liable to maintain a child; and (b) any person who has care of a child, shall be presumed to have responsibility for the child." 60. The prosecution did not open the case for the Assistant Magistrate in any great detail. There was a reference to the charges, with a brief introduction as to the witnesses who would be called and it was then said that the prosecution case was that the three defendants took to the sea between Portbail and Jersey entering into Jersey territorial waters in a vessel that was entirely unsuitable for the journey; and that the preparations were also entirely unsuitable for the journey. Nothing was said about intention or recklessness. In closing the case the prosecution said this:- "Sir, the charge also avers intention or recklessness. This was a planned journey and it's fair to say that when we are dealing with intention or recklessness a tribunal such as this can infer, in the proper circumstances, from all the circumstances and probabilities, such intention or recklessness as it deems appropriate. So we're dealing with the entirety of the case, where the defendants found themselves, what they were facing, what they needed to do and how they chose to do it." This approach did not provide the Assistant Magistrate with much help as to the mens rea of the offence. 61. As to recklessness, the prosecution and the defence had agreed on what they contended was the appropriate test. A formal document before the Assistant Magistrate was that the mens rea of recklessness in the context of the present case was that "the person with responsibility for a child foresaw a risk that an act or omission regarding that child would be likely to result in significant harm, but nonetheless took that risk." That was the agreed basis put before the Assistant Magistrate. The transcript of part of Advocate Dale's closing submissions on behalf of the First Appellant shows this:- "Advocate - It doesn't appear, according to my records, that we've heard any evidence over any of the days to suggest that my client intentionally put the children at harm. That is Magistrate - sorry at risk of harm? Advocate - yes put the children at risk of harm. That is that she wanted to cause them harm. There was certainly the intention to make the crossing, but what we ... Magistrate - sorry, I don't think anyone is suggesting that your client or Mr Tremoceiro's clients wished any harm to come to those children. I, not at all. Advocate - No, Sir, the prosecution haven't clarified that point. So I am just clarifying that for them ... Magistrate - OK, well, I, I do not see any suggestion that they have intentionally ... Advocate - I am grateful for ... Magistrate - ... wanted to cause their children, the children harm, but that's not the offence. It's exposing to a risk of harm. Advocate - Yes, well, they wanted to cause them a risk, to be exposed to risk of harm is what it should have said but I submit that the real focus in this case is whether they were reckless. Sir you have been provided previously with the agreed mens rea for recklessness. Magistrate - Well I have, but I don't, is this what you have for the, I'm, it's not

what the law says. Because you've mentioned significant harm in here, likely to result in significant harm. Advocate - Sir Magistrate - The law doesn't say that. Advocate - No it just says a risk of harm. Magistrate - Yes Advocate - I accept that." 62. On behalf of the Second and Third Appellants, Advocate Tremoceiro in his closing submissions made it plain that there had been no evidence of intention to expose the children to a risk of harm, or from which such intention could be inferred. As he said "all adults concerned have a loving relationship with the children and the last thing that would cross their minds would be to intend to expose them to risk." He then turned to the proposed definition of recklessness, explaining how that definition had been reached in discussions with the prosecution, namely by reliance on a report entitled *The Criminal Law and Child Neglect* prepared by the working group in the United Kingdom Working for Children. 63. We turn next to the approach of the Assistant Magistrate. In his judgment dated 3rd January, 2020, the Assistant Magistrate said this:- "9. A person intends a consequence if he wants that consequence to follow from his action. Even if the consequence is not wanted, in this case exposure to a risk of harm, it can still be intended if it could be foreseen as a by-product of the person's action: the greater the probability of the consequence, the greater the probability of it being foreseen and thus the greater the probability that it was intended. This is to be tested upon a consideration of all the evidence.

10. In regard to recklessness, I was provided by counsel with what was described as an agreed statement as to the mens rea in the following terms: 'The person with responsibility for a child foresaw a risk that an act or omission regarding that child would be likely to result in significant harm, but nonetheless took that risk.'
11. This was seemingly based on a review of certain provisions of the Children and Young Persons Act 1933 . It was part of a proposal to use the term 'reckless' rather than 'wilful' in a new offence of child maltreatment where the child suffers, or is likely to suffer, significant harm.
12. Article 35(1)(b), however, does not deal with a child suffering or being likely to suffer harm and neither does it refer to 'significant' harm. I did not see how these elements could form part of the mens rea of the primary offence, although there is a question of proportionality: not every potential harm that a child might be exposed to would justify prosecution.
13. The Children (Jersey) Law 2002 is a more modern piece of legislation and I was not provided with any Jersey authority on the interpretation of recklessness in this context. The most recent local consideration of recklessness albeit in regard to the offence of assault, was by the Court of Appeal in *De la Haye v AG* [2010] which concluded that recklessness has a subjective element.
14. In regard to this offence a person recklessly exposes a child to a risk of harm if they are aware that such a risk (ie a risk of exposure to a risk of harm) exists or will exist and in the circumstances known to them they go on to take that risk." Discussion 64. The Law made new provision for children. Although it creates a number of offences, most of the provisions

in the Law are aimed at civil rights and obligations, whether in private family law or in public law. Part 5, in which Article 35 is to be found, is a part of the Law which deals with the protection of children. Most of its provisions are concerned with emergency protection orders and powers given to the authorities to take children into care where there is reasonable cause to believe that the child is likely to suffer significant harm. The first question is what "harm" means in Article 35. It is relevant to review this inter alia because the Assistant Magistrate appears to have rejected the agreed test of recklessness because that test included a reference to "significant harm". 65. It is to be noted in Article 35(1) that there is reference merely to the causing of harm to the child, the exposure of the child to a risk of harm or the neglect of a child in a manner likely to cause harm. Harm is defined in Article 1(1) of the Law which provides that:- "In this Law, except where the context otherwise requires - ... "harm" has the meaning assigned by Article 24(6) and the question of whether harm is significant shall be construed in accordance with paragraph (7) of that Article;" 66. By Article 24(6) "harm" is defined as meaning ill-treatment or the impairment of health or development, and there is a wide definition of development and indeed of ill-treatment. By Article 24(7):- "Where the question of whether harm suffered by a child is significant turns on the child's health or development, his or her health or development shall be compared with that which could be expected of a similar child." 67. The point has not been argued before us but Article 35(2) appears to restrict the ambit of the neglect offence - clearly here, the legislature has in mind neglect causing the likelihood of harm by a parent failing to provide or procure the necessities of life; and while we do not decide the point definitively, we think it may well be necessary to construe the offence in Article 35(1)(c) in that very restrictive way. We cannot envisage that the legislature intended to create such a wide ranging offence likely to criminalise at one time or another most parents in the Island. The type of harm contemplated by Article 35(1)(c) is certainly harm that is serious or significant. 68. We express a similar view in relation to causing harm to a child under Article 35(1)(a). First of all, it is natural and right to construe the word "harm" consistently through Article 35(1). One cannot expect the legislature to have intended that the same word would carry a different meaning in different parts of one of few Articles in the statute creating criminal offences. Secondly, a wider definition of "harm" would mean that not only in almost every public law case but also in most families generally it would be reasonable to argue that the conduct of one or both parents, or sometimes any other carer having responsibility for the child from time to time, has committed the offence of causing some harm. That would give an outcome that would be damaging to any community. 69. We add also that while prosecutors will of course consider the public interest in deciding whether or not to charge under Article 35, the real guardian of the community in this respect is not through the exercise of prosecutorial discretion but through the application of the law by the Court. Intentionally or recklessly causing harm to a child, or neglecting a child in a manner likely to cause the child harm reflects conduct across a spectrum of activity by those having responsibility for the child; at one end of the spectrum, some deliberately unkind conduct is just that, namely it is unkind but not criminal. At the other end of the spectrum, the conduct becomes objectively so bad that it is to be considered as criminal. 70. We do not think that

the context of Article 35 requires any other interpretation of the word "harm" and we conclude that Article 35 means serious or significant harm. Whether harm has been caused to a child for the purposes of Article 35(1)(a) requires the Court to consider whether objectively the harm caused is such that it would be criminal to have caused it. It would be wrong to interpret the legislation on the basis of criminalising those having responsibility for a child by convicting them for very minor harm caused on the basis that the appropriate penalty could then be reflected in a non-custodial sentence. The criminal law is reserved for more serious conduct than that and the seriousness of the offences under Article 35 can be measured by the maximum term of imprisonment, namely 10 years imprisonment or an unlimited fine. 71. We now turn to the offence in Article 35(1)(b)

- intentionally or recklessly exposing a child to a risk of harm. If one construed that language expansively, even with "harm" meaning serious or significant harm, most parents would commit this criminal offence at least once if not more often during the course of their children's upbringing. As Advocate Dale submitted to the Assistant Magistrate, this would include parents taking their children anywhere in a car. The lives of all of us are affected by the concept of risk. The more serious the risk, the more precautions one takes. Sometimes, the risk is so serious that one would not take it at all. The Covid 19 pandemic is a very topical example of this and different sections of the community have acted in different ways according to their own assessments of the risk of catching the virus and the possible outcomes. Furthermore, counter intuitive as it may seem to the express language of the statute, a parent who protects his or her child from any exposure whatsoever to a risk of harm arguably causes that child serious harm by not doing so because the child's development would be impeded and the child not properly prepared for adult life. 72. The other feature of this question of harm or risk of harm is that the Law assumes that until public law proceedings have issued, it is the parents or other persons with parental responsibility who have the right and obligation to take decisions with respect to the child. Most people having responsibility for the care of children know instinctively where the bounds of reasonableness lie in dealing with children. Any person, for example, can be badly hurt, perhaps even killed, playing cricket. This would be serious or significant harm. Equally, most parents would not hesitate to conclude that there was an acceptable risk of harm if their child played cricket with other children of his or her own age. It becomes a question of assessing risk if the child aged 7 is to play cricket with children aged 13 or 15. Generally the extent of the risk is a matter that one would leave to parents. It is only when objectively the risk is too great that one looks at the question of an offence under Article 35. The crime here is not simply anti-social conduct, but it is conduct sufficiently far along the spectrum to incur the condemnation of the community through the courts. Prosecutors will of course apply this rationale when taking a decision to prosecute. We return to this when examining the grounds of appeal 5, 6 and 7. The fact that this is an island community with a significant sea-going population affects the approach to risks of the kind encountered in this case. 73. We now turn to the question of mens rea because Article 35(1) makes it plain that a person is only to be convicted under this Article if he or she has acted intentionally or

recklessly. This is not a strict liability offence. The mental element which is required is linked to the definition of the particular crime - in other words, there must be an intention or recklessness in, for the purposes of Article 35(1)(b), exposing the child to a risk of harm.

74. At common law in England and Wales, and also in Jersey, an honest and reasonable belief in the existence of circumstances which, if true, would make the act which is the subject of the charge an innocent act, has always been held to be a good defence. This is as true of statutory offences as it is of offences at customary law, unless the statute expressly or by necessary implication provides otherwise.

75. In most cases, the book of common sense allows one to form a view as to whether a defendant intended to commit the offence in question. Of course a result is intended when it is the defendant's purpose to cause that result. Where the defendant asserts that it was not his purpose to cause it, but the result is a virtually certain consequence of what he did, a court or jury may well find that the result was intended; but the legal test remains that the defendant must be proved to have the intention to cause that result.

76. The Assistant Magistrate found in this case that the First Appellant knew of the risks associated with sea travel and intentionally set out on the voyage with her children with insufficient preparation and equipment. As a result they were exposed to a risk of harm (see paragraph 78 of his judgment). In doing so, he elided (joined together) the intention to make the journey with an intention of exposing the children to risk. The two questions are distinct. As we indicated earlier, it would be possible, in theory, for a conviction to be supported where objectively the result of the conduct was almost certain to come about; but here it offends common sense to say that the First Appellant intentionally exposed her children to the risk of the harm which the expert witnesses identified as being the risk of this crossing. It is clear from the evidence that the Appellants in fact took many steps in order to ameliorate such risks as they perceived. They had a new boat and a new engine which had been run in. They had oars. They had life jackets for the children. They had more than one telephone, suitably protected from the sea, and there were mobile signals through both Orange and JT. They researched the route, and obtained on the day a weather forecast including a forecast of sea conditions which were relatively benign. The Second and Third Appellants made a three day trip to Jersey the previous October to reconnoitre. Both the First and Second Appellants had experience of water-based activities. There was no evidence that they took a dangerous route. They had insurance which covered this particular journey and although at 3.2 metres in length, this particular craft would be considered by many to be short of the length of craft desirable for the journey from Portbail to St Catherine's, the manufacturer's specifications suggested it could cope with winds up to Force 6. The First Appellant had a GPS to enable her to follow the course for St Catherine's. Visibility was good. They had ample reserves of fuel.

77. The Crown says, as did the Assistant Magistrate in his judgment, that the intention to take the children to sea, which was objectively to expose them to risk, is good enough for a conviction even though there was no actual intention to expose them to risk. That would mean that the First Appellant need not herself have seen there was any risk. That is a different approach conceptually from the agreed definition of recklessness (see paragraph 61) which relies on a knowledge in a defendant of the risk and nonetheless the taking of it. It is not obvious why, if

this is right, a defendant's recognition of the risk is a material factor in the reckless offence, but not a factor in the intentional offence. It shows the stance adopted by the prosecution and the Assistant Magistrate in relation to the test for the necessary intention was wrong. 78. It seems to us to be impossible to say that the First Appellant intentionally exposed her children to any risks which she thought were likely to come to pass. The problem in eliding an intention to make the journey with an intention to expose the children to risk is that when one examines the facts of this case, as demonstrated on the evidence, it is obvious that none of the Appellants had the latter intention. 79. As to recklessness, the Assistant Magistrate had an agreed statement as to the mens rea of recklessness in this case. It was not a statement which he applied in his judgment. He found that if he was wrong in finding that the First Appellant had intentionally exposed the children to a risk of harm, he would on the evidence have found her guilty of recklessly doing so. His reasoning for this was that the family had some water-based experience including safety training, and the First Appellant had personal experience of things going wrong whilst at sea. She was, in the Assistant Magistrate's view therefore, well aware that there were risks associated with the voyage and indeed risks of significant harm. She took some precautions to lessen the risk of harm occurring, but he had found those were insufficient, and thus the risks remained. He then went on to say "The question of recklessness will depend on the reasonableness or otherwise of the risk. There was no objective justification for them undertaking the journey in this manner, her only motivation being to avoid compliance with a court order. A standard commercial voyage would have been objectively risk free for the children" . 80. Accordingly he found that, knowing the children were to be carried in these circumstances and yet going ahead anyway, the First Appellant was reckless as to their exposure to a risk of significant harm. It is not clear if the Assistant Magistrate considered that the harm in Article 35(1)(b) had to be significant harm but it is clear that he thought the degree of harm was irrelevant to the question of mens rea. In so concluding, he misdirected himself in saying:- "12. Article 35(1)(b), however, does not deal with a child suffering or being likely to suffer harm and neither does it refer to 'significant harm'. I did not see how these elements could form part of the mens rea of the primary offence, although there is a question of proportionality: not every potential harm that a child might be exposed to would justify prosecution." One needs to know what the actus reus is in order to identify the mens rea . 81. The agreed test put before the Assistant Magistrate required him to consider whether the First Appellant foresaw that the risks that the journey would be likely to result in significant harm should be taken. That two part test required the Assistant Magistrate to consider whether the journey was likely to result in significant harm and whether the First Appellant knew it. It is clear on the evidence that it was a journey which, if things had gone wrong, could have resulted in significant harm, but it is far from clear that it was likely to do so. Indeed the evidence pointed the other way. The Assistant Magistrate considered a number of particular features, all set out at paragraph 78 of his judgment. In our view, whether individually or cumulatively, they do not establish that the children were likely to suffer significant harm. In fact of course the children did not suffer significant harm and there is no evidence that they came close to suffering significant harm The Assistant Magistrate's

reasoning took him into territory of what could have gone wrong, rather than what was likely to go wrong, which was the test which had been agreed by the prosecution and the defence and accordingly he misdirected himself. 82. We should not be taken to be suggesting that what was agreed between the prosecution and the defence was necessarily a correct statement of the law as regards recklessness for the purposes of an offence under Article 35 and indeed we have not been addressed on that either in writing or, for obvious reasons, orally. It does not seem to us that this is important for the purposes of this appeal. Where the prosecution and the defence have agreed what the law on recklessness was - which was agreed before trial and notified to the Assistant Magistrate - and evidence then adduced on that basis, it would be procedurally improper to apply any other test without giving the defendant an opportunity to address it. A defendant should not be in the position of defending himself or herself on an agreed basis only to find that the Court, after the evidence has been heard, applies a different legal test. It was the Court's function to determine the law but where that was different from that agreed by the parties, that should have been made clear in advance. The fact that this was not done amounted to a serious irregularity and the Assistant Magistrate's conclusions on recklessness cannot be supported on this ground as well. 83. The Assistant Magistrate placed a good deal of weight in his judgment to his conclusion that this was an intentionally covert crossing with no proper inquiry of or notification to either the French or Jersey authorities as to the departure, the route or the scheduled destination. He seems to have applied this reasoning to his conclusion that there was an intention to expose the children to risk. If that is correct, which is the way in which we construe his judgment, then he was in our view in error, for the same reason - evidence as to the covert nature of the trip goes to the intention to make the trip but not to the intention to expose the children to risk. The two concepts once more have been elided. 84. We do not make that criticism in the context of the assessment of recklessness. In our view, the covert nature of the journey could theoretically have supported the view that the First Appellant knew of the risks but was so determined to make the journey covertly that she was prepared to take them, which might have led to a conclusion of recklessness. However, the Assistant Magistrate, in his judgment at paragraph 90 does not express himself in that way. He said that the First Appellant was motivated to avoid compliance with a court order and thus had no objective justification for undertaking the journey in the way she did. The only way in which her motivation for taking this particular journey could have been relevant would be in assessing whether it shows that she knew of the existence of the risk of likely harm to the children and this was the reason she was prepared to take it. On the facts, however, there was insufficient evidence to justify such a conclusion. 85. For these reasons, it appears to us that the learned Assistant Magistrate misdirected himself in connection with the necessary mens rea, and accordingly, regardless of the other grounds of appeal, the convictions cannot stand. Grounds 5, 6 and 7 86. The remaining grounds of appeal are that there was insufficient evidence upon which the Assistant Magistrate could convict, that he took into account matters he should not have taken into account and failed to take into account matters which he should, and he drew wrong conclusions and inferences from the evidence. In essence the Assistant Magistrate relied on the expert evidence. He has not

explicitly reminded himself that expert evidence does not have to be accepted by a tribunal of fact, but we are confident he would have realised this. With some hesitation, because expert evidence has been permitted in circumstances where the experience of members of this court is such that it would not have been considered necessary, we add this. 87. Captain Richard dit Leschery said this was not a journey he would have made in that craft. Not all members of the Court would take that view having regard to the weather and sea conditions on the day and the fact that this was one hour's journey, but that only demonstrates that our personal experiences of the risks which might be involved in this journey put it at the end of the spectrum which does not indicate criminal activity on the part of the Appellants. The risks which were identified in this case were actually risks which applied equally to the children as to the adults. They were risks as to what could go wrong, and not risks as to what was likely to go wrong. The adults did not consider them to be risks which it was unreasonable for them to take. It seems to us to be difficult in those circumstances to conclude that exposing the children to the same risks was criminal. It might or might not have been negligent parenting - about which no doubt there would be argument, but it falls well short of behaviour which is criminal. 88. In the light of the conclusions we have reached above, it is not necessary to go into any great detail on this grounds of appeal and we limit ourselves to saying that it seems to us that there is some considerable mileage in them. The factors which the Assistant Magistrate took into account set out at paragraph 78 of his judgment do not seem to us to carry the weight which appears to have been given to them. The boat was not designed to be used for such a journey, nor to carry three adults and two children. (i) The boat in question was designed to carry four adults. It is true that three adults and two children are five people in total, but this is not the same as five adults particularly when the children were small, as here. Importantly, there was room for the five people in question and the weight of people equipment and outboard engine was significantly below the weight limit for this boat. While we agree that the boat was on the small side for this journey, critically it was awarded design category C for coastal waters. Accordingly, the boat was suitable for journeys in the open sea in comparison to category D which is suitable for only sheltered waters. The First Appellant gave evidence that Jersey was in sight from the time they departed Portbail and, as the journey was from Portbail to St Catherine's Bay, it fell within the definition of "coastal". Furthermore, the weather forecast was vital in determining whether it was safe to make this journey in this inflatable. At Force 4 or more, or in poor visibility, this was not a journey which members of the Court would have contemplated making in this craft. On the other hand, with a slight sea, and a settled forecast, the craft did not pose a particular risk for this journey. Furthermore, the vessel did have a CE plate and the Appellants complied with the restrictions on that plate. All five tubes were correctly inflated and indeed the existence of five tubes containing air gave inherent buoyancy. They chose the inflatable V floor which gave the safest ride. The Assistant Magistrate appears to have disregarded this evidence on the basis that the European Directive does not apply in Jersey waters, but in our view that is to ignore the fact that all the expertise of the European Commission in this particular area has led to this craft being approved to this defined safety standard. The single engine represented their only adequate

means of propulsion. (ii) This is true. The Appellants did have a pair of oars, but more importantly, there are many boats which put out to sea with only one single engine and the evidence before the court was that Honda outboards have an excellent reputation for reliability. This particular engine was new and had been run in. It had a pull start for added reliability. The Second Appellant worked out the fuel consumption and the distance to be travelled, and the engine hp was consistent with the restrictions on the CE plate. There was no evidence that this engine was unsafe. There was no propeller guard (iii) This is true. However, as was rightly admitted by Captain Richard dit Leschery, many engines do not have propeller guards. The absence of a guard would only be relevant if someone fell overboard and in that event, one of the adults on board could have stopped the engine while that person overboard was recovered. The sea was slight which made the chances of falling overboard slim. They had no means of direct communication with other vessels, no VHF radio to triangulate their position and without the correct telephone numbers no ready means of communicating with either French or Jersey sea rescue services (iv) All this is true. They did however have mobile telephones and there was a mobile signal at all times between Portbail and Jersey. Good practice would have led to a VHF radio being on board. In our judgment, there was a risk here, albeit we do not doubt that in the last resort the mobile telephones could have been used to make contact for help. The GPS enabled latitude and longitude coordinates to be given. The GPS was not fitted to the boat and A was monitoring the GPS and advising her father as to their course, at the same time as sitting on the side of the boat and supervising her young daughter. (v) This was true, but in our judgment represented no significant risk. More importantly there was a handheld GPS which the First Appellant was able to use to ensure they followed the right course. Waypoints for the journey were plotted in advance on the GPS. The evidence was that the children were sitting in the bottom of the boat, and supervision of them for an hour at the same time as checking occasionally on the GPS for the right course was hardly an onerous exercise. The GPS was attached by a lanyard around the First Appellant's neck. No experience of crossing these waters or of tidal flow (vi) This was true. However, the Appellants did have experience of boats and the sea, and did research and planning as to the course which they would follow. There was no adequate distress equipment (vii) This was true although whether flares would have been safe on an inflatable craft is perhaps more debatable. The adults' floatation aids were not designed for open water use (viii) This was true, but the charge related to the children and not to the adults. This was an irrelevant consideration. Not only did they not tell anyone of their plans, they intentionally carried out the journey in a clandestine manner (ix) This is true. However one has to relate this conduct to risk. We do so having regard to the fact that very many boat owners and users put out to sea without telling anyone of their precise plans. We gain the impression that it was the clandestine activity to avoid the effect of the Canadian Court orders which was weighing upon the Assistant Magistrate rather than the risk, when this feature was considered. Furthermore, Mr Dollimore's evidence was that, even if there had been a record of the vessel's name and intended route and the number of persons on board, with an estimated time of arrival, the harbour authorities receive a large number of these notifications, and

particularly in summer months are unable to follow up every estimated arrival time which passes without a confirmation from the vessel in question that it has arrived. The extent to which this would have been useful information to reduce risk is that it gives the Port authorities a starting point (somewhere between Portbail and St Catherine's) from which to make an assessment of the current whereabouts of the vessel, assuming indeed that someone has passed on the absence of the vessel in the first place. 89. Before leaving the question of the specific charges, we think it right to add this. In theory, the journey from Portbail to St Catherine's could have been dangerous on the French side of the dividing line between French waters and Jersey waters, and safe on the Jersey side. Indeed there was material in Mr Dollimore's second statement which might have supported that conclusion. However, the journey in French waters could not have given rise to a charge under Jersey law because the Jersey courts would have no jurisdiction over that conduct. The prosecution did not address the matter in this way, but in order to prove the charge under Article 35(1) (b), the prosecution had to show on the facts of this case that the children were exposed to risk in Jersey territorial waters. In establishing that case, the prosecution would have to discharge the usual burdens in demonstrating to the Court that the offence would equally be committed by a family going out to the median line in a craft of this kind leaving from Jersey and returning to Jersey

- in other words, that an offence would have been committed if the Appellants had intentionally or recklessly set out from Gorey or St Catherine's Bay in this craft loaded down with these passengers and with the equipment which this craft had in these weather conditions. The expert evidence which suggested it would be unsafe to travel from Portbail to Jersey in this craft was irrelevant because that evidence goes to a journey outside Jersey's territorial sea. Yet, if the test were to be applied solely within Jersey's waters, we cannot ignore the fact that there are many families regularly using craft of this nature, some longer, some shorter, some better and some worse equipped, sometimes in better and often in worse weather conditions and we do not think it would be right to criminalise all such behaviour. It will depend on the facts of each case. 90. We do not wish to belittle the expert witnesses and we do indeed respect their expertise. They were describing good practice, and good commercial practice at that. In our judgment the instant case was one where the court should have assessed the expert evidence for what it was - that of experts dealing in the commercial field, who were provided in this case with inadequate briefing for the purposes of the opinions they were asked to express, who addressed most of the issues in terms of generalities, did not examine the equipment in question and who in our judgment failed to have sufficient regard to the critical evidence of the capabilities of the craft in the sea and weather conditions at the time. In other words, they were not in our judgment applying their expertise to assess the particular risk which this particular family faced on this particular day. The test was whether, having regard to the planning undertaken and the equipment in question, the smooth to slight water and good weather conditions, the Appellants intentionally or recklessly exposed these children to a risk of serious or significant harm. Apart from the question of intention, on the evidence which was given, we do not think that

a tribunal could safely conclude that it was sure that the children had been exposed to risk of significant harm by being taken on this journey in these circumstances and in these conditions and accordingly, we would also have regarded these grounds of appeal on the evidence as being established. 91. We conclude with the comment that the Assistant Magistrate in his judgment said that the First Appellant took precautions but these were inadequate. In our judgment, the evidence points in one direction only, namely that the Appellants planned the trip with great care, and it is impossible to support that conclusion which the Assistant Magistrate reached. We think he allowed what he found to be the clandestine nature of the trip to influence him in his conclusions about risk and that he erred in this respect. 92. For all these reasons, the convictions of all three Appellants are set aside, as are the orders for costs. In addition, the Appellants are awarded their costs on the standard basis here and below. Authorities Magistrate's Court (Miscellaneous Provisions) (Jersey) Law 1949. Children (Jersey) Law 2002. Milho v AG

[2000] JLR 363 . Rushton v AG [16 October 1989, Jersey Unreported]. Graham v AG

[2013] (1) JLR 91. AG v O'Neill

[2018] JRC 199. Quinn v AG

[2018] JRC 183 . Querée v AG

[2018] JRC 014 . Hopkins v AG

[2018] JRC 168 . Attorney General v O'Brien

[2006] JLR 133 . Court of Appeal (Jersey) Law 1961 Magistrate's Court (Miscellaneous Provisions) (Jersey) Law 1949. Extradition (Jersey) Law 2004 Bisson v The Minister for Infrastructure

[2019] JCA 181 Otkritie International Investment Management and others v Urumov

[2014] EWCA Civ 1315 Locabail (UK) Limited v Bayfield Properties

[2000] QB 451 AB v HM Attorney General

[2020] JCA 094 The Greffier of the States v Les Pas Holdings Limited, the Waterfront Enterprise Board Intervenor (Jersey Unreported 1998/132) Criminal Procedure (Bail) Law 2017 Criminal Procedure (Jersey) Law 2018 Police Procedures and Criminal Evidence (Jersey) Law 2003 Page Last Updated: 01 Jul 2020 BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII

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