

JERSEY / JUDGMENT

Burnett v AG [2008] JRC 054 (04 April 2008)

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JUDGMENT

THE DEPUTY BAILIFF: 1. The appellant appeals against his conviction before the Magistrate on 8th January, 2008 on one charge of speeding. The grounds of appeal contend that the Magistrate erred in law in two respects:- (i) he did not give consideration to the mens rea element of the offence; and (ii) he failed to consider the effect of Article 6(2) of the European Convention on Human Rights ("ECHR"). The factual

background

2. The appellant does not dispute the essential facts, many of which were the subject of a formal admission before the Magistrate. 3. On Thursday 23rd August, 2007 the appellant was driving up La Grande Route de St Pierre with a view to continuing on to his home in Trinity. On that day there were road works on La Grande Route de St Pierre at the junction with Rue de L'Eglise (which runs west off La Grande Route past St Peter's Church towards St Ouen's Bay) and Route du Manoir (which runs east towards the entrance to St George's Preparatory School), as a result of which it was necessary for northbound drivers to leave La Grande Route and either turn left into Rue de L'Eglise or right into Route du Manoir. The appellant turned right into Route du Manoir, which is subject only to the normal island-wide speed limit of 40 mph. At the end of Route du Manoir is a crossroads, with Rue de la Hague going left-right across the road. The entrance to St George's School is immediately opposite, essentially on the crossroads. Mont du Presbytère makes the continuation of Route du Manoir on the other side of Rue de la Hague although it is offset slightly. 4. At the end of Route du Manoir, the appellant turned left into Rue de la Hague in order to continue north. Rue de la Hague is a green lane with a speed limit of 15 mph. After proceeding about 250 metres up Rue de la Hague he was stopped by Centenier Lamy for driving at 36 mph. The appellant does not dispute that he was driving at this speed but he asserts - and this is not disputed - that he did not know that there was a speed limit of 15 mph on Rue de la Hague rather than one of 40 mph. 5. There is no dispute as to the various signs which are erected in the area and we have seen the photographs which were also before Magistrate. 6. The first sign as one approaches along Route du Manoir towards the junction with Rue de la Hague is a 'give way' sign in conventional triangular form mounted on a pole. This is a short distance before the junction although no evidence was given as to the exact distance. Immediately prior to the junction (the evidence before the Magistrate was that it was something just over

a car's length before the yellow line) there is on the left hand side of Route du Manoir a conventional green lane sign. Thus it has at the top of the pole a rectangular sign with a picture of green trees and the words 'start of green lane'. Immediately underneath that is a circular sign with a large black '15' on a white background within a red perimeter. On the opposite side of the junction at the entrance to Mont du Presbytère there is another green lane sign on a pole with the words 'end of green lane' and underneath that, the conventional white circular sign with a black stripe indicating the end of a speed limit. That is because the limit on Mont du Presbytère is the standard 40 mph. Having turned left into Rue de la Hague, there is after a comparatively short distance a large '15' painted in white within a white circle on the road surface. We shall refer to this sign as the 'Advisory Sign'. The statutory provisions

7. Article 21 of the Road Traffic (Jersey) Law 1956 ("the 1956 Law") provides (so far as relevant) as follows:- "(2) The Minister may by Order prohibit the driving of a motor vehicle of any class or description on any road as may be prescribed in that Order:- (a) at a speed exceeding that specified in the Order; (4) If any person acts in contravention of any provision of any Order made under paragraph (2) he or she shall be liable to a fine not exceeding level two on the standard scales." 8. The relevant power under Article 21(2)(a) has been exercised by means of the Road Traffic (Speed Limits) (Jersey) Order 2003 ("the 2003 Order"), Article 4 of which provides:- "A motor vehicle shall not be driven at a speed exceeding 15 miles per hour on a road specified in Schedule 3." It is not disputed that Rue de la Hague is listed in Schedule 3 and that accordingly there is a 15 mph limit on that road. 9. Article 72 of the 1956 Law deals with the erection of traffic signs and provides (so far as relevant) as follows:- "(2) The Minister shall cause traffic signs to be placed and maintained on or near the roads to which any Order made under Article 21..... relates in such manner as to indicate the requirement of the Order....." Article 72(3) then provides that traffic signs will be of the prescribed size, colour and type but the appellant does not dispute that the 15 mph sign in Route de Manoir referred to above conforms to these requirements. Both parties also agreed that the 'Advisory Sign' painted on the road in Rue de la Hague is just that, in that it does not conform with any requirements which have been prescribed pursuant to Article 72(3). 10. The appellant relied both before the Magistrate and this Court on certain provisions from the equivalent English legislation, which we must therefore quote. Section 85 of the Road Traffic Regulation Act 1984 ("the 1984 Act") provides (so far as relevant) as follows:- "(1) For the purpose of securing that adequate guidance is given to drivers of motor vehicles as to whether any, and if so what, limit of speed is to be observed on any road, it shall be the duty of the Secretary of State, in the case of a road for which he is the traffic authority, to erect and maintain traffic signs in such positions as may be requisite for that purpose. (2) In the case of any other road, it is the duty of the local traffic authority:- (a) to erect and maintain traffic signs in such positions as may be requisite in order to give effect to general or other directions given by the Secretary of State for the purpose mentioned in sub-section (1) above)..... (4) Where no such system of street or carriageway lighting as is mentioned in Section 82(1) is provided on a road, but a limit of speed is to be observed on the road, a person shall not be convicted of driving a motor vehicle on the road at a speed exceeding the limit unless the limit is indicated by means of

such traffic signs as are mentioned in sub-section (1) or sub-section (2) above." The Magistrate's decision 11. Before the Magistrate the appellant argued that the 15 mph sign in Route du Manoir did not comply with the requirements of Article 72(2) in that it was not 'on or near' Rue de la Hague. He further submitted that, if this was the case, he should not be convicted. He pointed to Section 85(4) of the 1984 Act which provides a defence where the Minister has not provided adequate signage to alert motorists as to the existence of the speed limit. He accepted that there was no equivalent provision in the 1956 Law but argued that the Magistrate should nevertheless acquit where a motorist was in ignorance of the speed limit because of a failure to erect the signage required by Article 72(2). 12. The Magistrate agreed with the appellant that the 15 mph sign in Route du Manoir did not comply with the requirements of Article 72(2) as it was not 'on or near' Rue de la Hague. However he held that the offence of speeding was an offence of strict liability and accordingly the defect in the signage provided no defence in the absence of a provision equivalent to Section 85(4) of the English statute. Nevertheless, in view of the defect in the signage, he imposed an absolute discharge by way of sentence. 13. The appellant contends that the Magistrate was wrong to find that this was an offence of strict liability. Furthermore, he contends that the Magistrate did not have sufficient regard to Article 6(2) of the ECHR, which refers to the presumption of innocence. (1) Is speeding an offence of strict liability? 14. The appellant argues that a breach of Article 4 of the 2003 Order is not an offence of strict liability. In order to obtain a conviction, the prosecution must prove the existence of the required mens rea . He referred to the well known case of *Sweet v Parsley*

[1970] AC 132 . The effect of the decision is accurately recorded in the head note which reads:- "Mens rea is an essential ingredient of every offence unless some reason can be found for holding that it is not necessary, and the Court ought not to hold that an offence is an absolute offence unless it appears that must have been the intention of Parliament." 15. He referred specifically to the well-known dictum of Lord Reid at 148:- "Our first duty is to consider the words of the Act: if they show a clear intention to create an absolute offence that is an end of the matter. But such cases are very rare. Sometimes the words of the section which creates a particular offence makes it clear that mens rea is required in one form or another. Such cases are quite frequent. But in a very large number of cases there is no clear indication either way. In such cases there has for centuries been a presumption that Parliament did not intend to make criminals of persons who were in no way blameworthy in what they did. That means that whenever a section is silent as to mens rea there is a presumption that, in order to give effect to the will of Parliament, we must read in words appropriate to require mens rea." He submits that there is nothing to rebut the presumption in the case of speeding and that accordingly the Magistrate should not have regarded it as an offence of strict liability. 16. Helpful guidance on the correct approach in such matters is to be found in the judgment of Lord Scarman speaking for the Privy Council in *Gammon (Hong Kong) Limited v AG*

[1984] 2 All ER 503 at 508:- "In their Lordships' opinion, the law relevant to this appeal may be stated in the following propositions (the formulation of which follows closely the written submission of the appellant's counsel, which their Lordships gratefully acknowledge): (1) there is a presumption of law that mens rea is required before a person can be held guilty of a criminal offence; (2) the presumption is particularly strong where the offence is 'truly criminal' in character; (3) the presumption applies to statutory offences, and can be displaced only if this is clearly or by necessary implication the effect of the statute; (4) the only situation in which the presumption can be displaced is where the statute is concerned with an issue of social concern; public safety is such an issue; (5) even where a statute is concerned with such an issue, the presumption of mens rea stands unless it can also be shown that the creation of strict liability will be effective to promote the objects of the statute by encouraging greater vigilance to prevent the commission of the prohibited act." 17. Surprisingly, the researches of counsel have not unearthed a case where the English courts have ruled definitively on whether the offence of speeding is one of strict liability. However it is clearly generally accepted that this is the position; (see para 10 of the judgment of Astill J in *Wawrzynczk v Chief Constable of Staffordshire* (CO/4116/99) and para 16 of the judgment of Walker J in *Coombes v DPP*

[2006] EWHC 3263 (Admin)). 18. The appellant accepted that the offence was one of strict liability in England but argued that this was understandable because the rigour of a strict liability offence was tempered by the defence conferred by Section 85(4) of the 1984 Act where traffic signs giving adequate guidance to drivers of the speed limit had not been erected or maintained. He submitted that the absence of such a provision in Jersey supported his contention that the offence of speeding should not be regarded as an offence of strict liability in this jurisdiction. 19. When the Court pressed the appellant on exactly what he submitted was the mens rea of an offence of speeding, it became clear that this was a matter of no little difficulty. Did the accused have to have intended to drive at a speed in excess of the speed limit? Alternatively, would it be sufficient if he was reckless as to whether he was doing so; alternatively would it be sufficient if he had simply failed to take the steps that a reasonably prudent driver would take to ascertain whether he was driving in excess of the speed limit? 20. We have carefully considered the appellant's submissions but we are in no doubt that the Magistrate was correct in holding that an offence of exceeding the speed limit contrary to the provisions of the 2003 Order is an offence of strict liability. We would summarise our reasons as follows:- (i) The wording of the relevant provisions points strongly in that direction. Article 3 of the 2003 Order says simply that a motor vehicle shall not be driven at a speed exceeding 15 mph. Article 21(4) states simply that if any person 'acts in contravention of any provision of any Order' he shall be liable to a fine. (ii) Speeding is not an offence which might be regarded as 'truly criminal'. On the contrary, it is clearly concerned with the important issue of public safety. Cars which are driven at speed are dangerous and have the potential to kill or maim. There is an important public safety interest in ensuring that speed limits are adhered to. (iii) Indeed many motoring offences are offences of strict liability. Thus in *Hill v Baxter*

[1958] 1 All ER 193 Lord Goddard CJ said this:- "The first thing to be remembered is that the statute contains an absolute prohibition against driving dangerously or ignoring Halt signs. No question of mens rea enters into the offence; and it is no answer unto a charge under those sections to say "I did not mean to drive dangerously" or "I did not notice the Halt sign"." Similarly, the offence of driving with excess alcohol is one of strict liability. It is not a defence for a defendant to say that he did not realise that he had consumed excessive alcohol. This is so even if his drink has been spiked. Such circumstances may be relevant to sentence but they do not provide a defence. (iv) The fact that it is difficult to identify exactly what the mens rea would consist of points strongly in favour of this being an offence of strict liability. (v) The practical consequences of imposing any form of mens rea would be to increase greatly the number of those trying to escape the consequences of their speeding. If it were a defence simply for the defendant to be unaware of the existence of the speed limit despite the existence of signs etc., one can envisage endless cases where the defendant asserts that he simply did not see the signs and should therefore be acquitted. How is the Court to resolve such matters? If a higher threshold is applicable and it is only a defence if a defendant has taken all reasonable steps to ascertain what the speed limit is, one can still envisage endless arguments about whether a particular defendant did or did not take all reasonable steps. Turning to the words of Lord Scarman in *Gammon*, we have no doubt that the creation of strict liability will be more effective in achieving compliance with speed limits than if defendants, even when caught, can argue that they should be acquitted because they did not realise what the speed limit was. (vi) The maximum penalty is a level 2 fine and disqualification from driving. This suggests that the imposition of strict liability is not disproportionate, particularly bearing in mind the important public safety considerations. (vii) We do not consider that the absence of the English statutory defence conferred by Section 85(4) of the 1984 Act leads us to a different conclusion. We accept that, taken to extreme, the absence of such a defence could lead to a wholly unsatisfactory situation. Thus, in theory, the Minister might fail to erect any signs whatsoever in the island; or he might fail to erect any signs at any point on a particular road indicating that the speed limit in that road was below the island wide limit of 40 mph. In our judgment, in extreme cases, the Court could consider that the prosecution in those circumstances was an abuse of the Court's process. But this would be confined to exceptional cases. A more appropriate response where the signage was clearly inadequate to alert motorists to the speed limit would often be to grant an absolute discharge, as the Magistrate did in this case, and to make the Court's displeasure clearly apparent to the prosecuting authorities. In any event the absence of the English provision does not outweigh the considerations in the foregoing sub-paragraph.

(2) Article 6(2) ECHR 21. The second ground of appeal is that to construe the offence in this case as one of strict liability would be to contravene Article 6(2) of the ECHR. Article 6(2) is in the following terms:- "(2) Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law." The appellant argues that, even if on normal principles of construction the Court holds the offence to be one of strict liability, the Court should nevertheless use Article 4(1) of the Human Rights (Jersey) Law

2000 to interpret the 2003 Order and Article 21(4) so as to find a requirement for mens rea .

22. We do not accept this argument. Article 6(2) of the Convention requires that a defendant be presumed innocent until proved guilty according to law. However there is clear authority for the proposition that this does not prevent states from creating offences of strict liability. Thus in *Salabiaku v France*

- [1991] 13 EHRR 379 the European Court of Human Rights said this at para 27:- "(27) As the Government and the Commission have pointed out, in principle the Contracting States remain free to apply the criminal law to an act where it is not carried out in the normal exercise of one of the rights protected under the Convention..... and, accordingly, to define the constituent element of the resulting offence. In particular, and again in principle, the Contracting States may, under certain conditions, penalise a simple or objective fact as such, irrespective of whether it results from criminal intent or from negligence. Examples of such offences may be found in the laws of the Contracting States."
23. The effect of this decision is summarised in Harris, O'Boyle & Walbrick, *Law of the European Convention on Human Rights* (1995 Edition) at page 244:- "As the *Salabiaku* case also decided, Article 6(2) does not prohibit offences of strict liability, which are a common feature of the criminal law of the Convention Parties. An offence may thus be committed, consistently with Article 6(2), on the basis that a certain act has been committed, without it being necessary to prove mens rea. Provided a state respects the rights protected by the Convention, it is free to punish any kind of activity as criminal and to establish the elements of the offence in its discretion, including any requirement of mens rea." 24. For the reasons set out earlier, we consider it reasonable and proportionate for an offence of speeding to be an offence of strict liability and accordingly there is no breach of Article 6(2) of the Convention. 25. The Court having found against the appellant on both grounds of appeal, it follows that the appeal must be dismissed. The location of the sign 26. Because we have held the offence in question to be one of strict liability, it is not essential for us to consider whether the Magistrate was correct in finding that the 15 mph sign on Route du Manoir did not comply with the requirements of Article 72(2) of the 1956 Law. However, the finding is clearly one of significant practical importance to the highway authorities and, on behalf of the Attorney General, Advocate Hollywood has asked us to consider whether the Magistrate's decision should be upheld. 27. As indicated earlier, Article 72(2) imposes a duty on the Minister to cause traffic signs to be placed and maintained 'on or near' the road in question in such manner as to indicate the requirement of the Order i.e. that the road is subject to a particular speed limit. 28. It is accepted that the Advisory Sign painted on the surface of Rue de la Hague is not relevant for these purposes as it does not constitute a 'traffic sign' for the purposes of Article 72(2). We are therefore concerned only with the 15 mph sign erected on the left hand side of Route du Manoir approximately one car's length from the yellow line at the end of Route du Manoir marking the junction with Rue de la Hague. 29. Before the Magistrate, the appellant submitted that the sign did not comply with the requirements of Article 72(2). He pointed out that it was in Route du Manoir. It was not therefore 'on' Rue de la Hague. Was it 'near'

Rue de la Hague? He argued that, in order to fulfil the requirements of Article 72(2), it had to be sufficiently near and in such a location as to make it clear to an unfamiliar user that it applied to Rue de la Hague rather than to Route du Manoir or any other road. At this junction there were at least three signs (the 'give way' sign in Route du Manoir, the 15 mph sign and the sign on the opposite side of the junction at the entrance Mont du Presbytère indicating the end of the 15 mph zone). It was therefore quite confusing to an unfamiliar user of the route. The sign was more than a car's length from the yellow line and could therefore not be seen by a driver who had stopped at the junction before deciding which way to turn. He submitted that the sign should be in such a position as to be visible to a driver immediately prior to turning into the road which bears the restriction so that it can be seen to apply to that road. He referred also to the case of *Coombes v DPP* (supra) where, applying the statutory defence at Section 85(4), the court held that the fact that the road signs indicating the speed limit were visible only at the point at which the appellant drove past them, because until that point they were obscured by overgrown hedgerows, meant that the statutory defence was made out. 30. In his decision, having noted that the sign was at least a car's length away from Rue de la Hague, the Magistrate held that it was not sufficiently near to comply with Article 72(2), which he interpreted as requiring that the sign must be on the road or very close. However he gave no further reasons for his decision. 31. On an appeal from the Magistrates' Court, it is not the function of this Court to substitute its view for that of the Magistrate. This Court may only intervene where it considers the Magistrate's decision to be unreasonable. See *Templeton-Brown v Attorney General* (Jersey Unreported 19 th March 1996) and *Little v Attorney General* (Jersey Unreported 12 th September 1994). In relation to findings of fact which depend upon the testimony of witnesses whom the Magistrate has seen and heard, this Court will be particularly slow to intervene. However that is not the case here. There was no dispute as to the primary

facts.

The Magistrate's decision was an inference which he drew from those primary facts. 32. With great respect to the Magistrate, this Court has no hesitation in concluding that his decision on this point was unreasonable. (i) We accept the appellant's submission that the whole purpose of Article 76 (2) is to ensure that signs are erected which enable a motorist to be aware of the speed limit before he enters the restricted zone. Rue de la Hague is a typical road with a number of side roads joining it during the course of its length. It is necessary therefore for there to be signs at each end of the road (so as to alert drivers to the speed limit as they enter upon the road). It is also necessary to have signs which will alert drivers who enter the road during the course of its length from a side road. (ii) It is for consideration in each case whether motorists emerging from a side road are best alerted to the existence of the speed limit on the road which they are entering by a sign on the side road itself near the junction or by a sign which can be seen as the motorist turns left or right into the road. In most cases it is likely that either solution will satisfy the requirements of the statute (namely to alert the motorist) and it will be a matter of choice for the

Minister as to which option he chooses. (iii) In this case the Minister chose to place the 15 mph sign on Route du Manoir i.e. the side road. In our judgment no motorist who saw the sign as he approached the junction along Route du Manoir could possibly be in any doubt as to what it meant. Route du Manoir itself is a 40 mph zone. The sign could not possibly be thought to apply for the very short distance of Route du Manoir which lies between the sign and the yellow line on the junction with Rue de la Hague. Similarly, the sign could not possibly be thought to apply to Mont du Presbytère (on the opposite side of the junction) because a motorist in Route du Manoir can see the sign at the entrance to Mont du Presbytère indicating the end of the 15 mph limit. It is crystal clear therefore that the 15 mph sign could only apply to Rue de la Hague. (iv) Is it sufficiently 'near' Rue de la Hague to comply with Article 72(2)? In our judgment whether a sign is sufficiently near has to be considered in the context of the purpose of erecting the sign. Is it sufficiently near to the relevant road so as to make it clear to any motorist seeing the sign that it applies to the road in question and not some other road? In this case the sign was just over a car's length from the yellow line and the junction. For the reasons given in sub-paragraph (iii) in our judgment this is undoubtedly sufficiently 'near' Rue de la Hague to comply with the requirements of Article 72(2) in the circumstances of this particular junction. (v) It is not clear from the Magistrate's decision where he thought the sign had to be placed in order to be sufficiently 'near' or why he thought it was not sufficiently 'near'. If he considered that it had to be a few feet closer to the yellow line or opposite the yellow line itself, this would make no difference to the effectiveness of the sign. Any motorist approaching the junction along Route du Manoir has to slow down as he approaches the junction and will have ample opportunity to observe the sign regardless of whether it is in its present location or whether it is at some point between the present location and the yellow line. Moving it would make no difference to its effectiveness. If he considered that the sign should have been in or on land immediately adjacent to Rue de la Hague itself then, for the reasons given above, we do not consider that this was necessary in order to comply with Article 72(2) (vi) In short, the placing of the 15 mph sign in this particular location made it quite clear that there was a 15 mph limit in Rue de la Hague and the sign was sufficiently 'near' Rue de la Hague to satisfy the requirements of Article 72(2). 33. The Magistrate imposed an absolute discharge on the appellant because of his decision that the 15 mph sign did not technically comply with the requirements of Article 72(2). Even if we had agreed with that latter finding, we would have considered the sentence imposed to be unduly lenient. The fact remains that, even allowing for the fact that he was unfamiliar with the road, the appellant drove past a clearly visible 15 mph sign and then drove over a highly visible Advisory Sign painted on the road surface of Rue de la Hague indicating a speed limit of 15 mph; yet he did not notice either of them. We see no reason to differentiate between the appellant and any other driver who asserts that he had not noticed the sign warning motorists of a speed limit. In those circumstances a fine is still normally imposed. Had Miss Hollywood asked us to exercise our powers under Article 20(4) of the Magistrates Court (Miscellaneous Provisions) (Jersey) Law 1949 to increase the sentence we would have done so; but, as she did not, we do not think it necessary in the particular circumstances of this case to exercise that power on our own initiative. 34. Finally, although we have dismissed his appeal, we would like to pay tribute to the appellant for the clear and logical submissions which he made both in writing and orally. Authorities Road

Traffic (Jersey) Law 1956. Road Traffic (Speed Limits) (Jersey) Order 2003. Road Traffic Regulation Act 1984. Sweet v Parsley

[1970] AC 132 . Gammon (Hong Kong) Limited v AG

[1984] 2 All ER 503 . Wawrzynczk v Chief Constable of Staffordshire (CO/4116/99). Coombes v DPP

[2006] EWHC 3263 (Admin) . Hill v Baxter [1958] 1 All ER 193. Human Rights (Jersey) Law 2000. Salabiaku v France

[1991] 13 EHRR 379 . Law of the European Convention on Human Rights (1995 Edition) Harris, O'Boyle & Walbrick. Templeton-Brown v Attorney General (Jersey Unreported 19 th March 1996). Little v Attorney General (Jersey Unreported 12 th September 1994). Page Last Updated: 15 Oct 2015 BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII

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