

JERSEY / JUDGMENT

Khan v AG [2020] JRC 128 (02 July 2020)

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JUDGMENT

THE DEPUTY BAILIFF: 1. Mr Khan ("The Appellant") appeals against the conviction recorded against him on the 5 th September, 2019, by the Magistrate's Court when he was found guilty of failing to stop and report an accident contrary to Article 52 of the Road Traffic (Jersey) Law 1952 . He appeals by notice dated the 26 th November 2019, the time for appeal having been enlarged by a judge of the Royal Court. 2. The collision which gave rise to the charge took place on the 7 th October 2018, when the Appellant was the driver of one of two vehicles involved. Both cars were badly damaged in the accident and both drivers, and the Appellant's passenger, were fortunate to escape serious injury. 3. The grounds of appeal, dated 26 th November 2019, refer to two general grounds of appeal, the second of which has been abandoned. The first relates to additional evidence which had been obtained from a forensic medical examiner who examined the Defendant at the material time. It is said that this "provided additional evidence which may have caused the Relief Magistrate to consider the Defendant's evidence to be more reliable and the defence expert witness to be better informed as to the facts." 4. Although the grounds of appeal have not been amended, it is clear from the affidavit sworn by the Appellant on the 7 th February 2020 that, in fact, he seeks to adduce on appeal, not only the additional evidence of the forensic medical examiner but also 'accurate, agreed fact evidence' , and further evidence from two lay witnesses, witness A and witness B. The application before the Court in the form of a skeleton argument by counsel for the Appellant says that the 'fresh evidence' incorporates the additional statement from the forensic medical examiner (Dr Evans), further expert evidence, witness statements of witness A, witness B, and a third witness, witness C. 5. Further, the Appellant also questions the competence of his trial counsel, Advocate C Hillier. He says that Advocate Hillier agreed evidence that he ought not to have agreed; failed to obtain adequate witness statements from potential defence witnesses; failed to adduce that evidence at trial or seek an adjournment so as to ensure that such evidence was heard by the Relief Magistrate. 6. He argues that had the Relief Magistrate had the accurate forensic medical evidence, accurate agreed facts, and had heard evidence from the three defence witnesses available then she may have reached a different verdict. 7. It is appropriate now to set out the facts; the conclusion of the Relief Magistrate as contained in her judgment; the relevant case law and thereafter to apply the test drawn from the case law to this application, against the background of the facts in this case. The defence case at trial 8. The defence case was that the Defendant was unable to form the requisite intent under Article 52 of the Law owing to concussion sustained during the collision. Article 52 provides a

statutory defence to a defendant who has failed to comply with his duty under Article 52(1)(a), namely to immediately inform a police officer of the occurrence of the accident and not move the vehicle without the consent of a police officer. The proviso to liability under Article 52(1) is contained in Article 52(2), namely:- "52(2) Provided that a person shall not be convicted of an offence under this Article if he or she prove to the satisfaction of the court that his or her failure to comply with the provisions thereof was not with the intent of avoiding any civil or criminal liability arising out of the accident." In this case the Appellant argued that owing to the fact that he was concussed he was unable to form such an intent and fled the scene for other reasons - including panic, confusion and disorientation. The relevant facts 9. The prosecution's case was largely reduced to agreed facts which were set out in writing and presented as part of the prosecution case. They had been agreed to by the Legal Adviser for the Crown and the advocate for the Appellant. The Appellant says that in fact he does not and did not provide his agreement to all the agreed facts but trusted his advocate to do what was right, but the specific matters with which he takes issue we will identify subsequently in this Judgment. 10. In summary, shortly after midnight on Sunday 7th October 2018 (i.e. in the early hours of Sunday morning), the Appellant's Range Rover collided with a green Ford Fiesta in the vicinity of Maufant. The Appellant's vehicle was driving towards St Helier. The other vehicle contained only one occupant. The Appellant's vehicle contained the Appellant (the driver) and a front seat passenger, Charlotte Bunyan. Miss Bunyan was looking at her mobile telephone at the time of accident and was unable to describe what occurred. The essential agreed facts in respect of events following the collision were as follows:- "12. Charlotte Bunyan and the defendant exited the Evoque vehicle and ran across the road. 13. The defendant ran back to the car to retrieve his telephone. 14. They then walked towards St Saviour School. 15. Charlotte Bunyan believes that the defendant mentioned going to his boyfriend's house." The agreed facts then went on to describe the arrival on the scene of another vehicle moments after the accident and prior to the Defendant leaving the scene:- "25. Anthony Stephens had also exited the vehicle and he approached the defendant's car. 26. He saw the defendant get out and briefly spoke to him. 27. The defendant was unable to say if anyone else remained in the car. 28. The defendant and a blonde female had a brief conversation. 29. Mr Stephens thought they both looked intoxicated." 43. At 00.15 hours the same day Detective Constable Martin Davies and Police Sergeant Anna Royle attended the defendant's home address. The defendant's mother answered the door. 44. The defendant was not present at the address. 45. The officers undertook an unsuccessful area search. They returned to the defendant's home address at 00.55 hours. He still was not present. 46. At this time a telephone call was made to the defendant. He refused to tell the officers his whereabouts and appeared to be surprised that they wanted to speak to him. 48. At 09.35 hours the same day PC Duncan Gray arrested the defendant at his home address for failing to stop and report an accident." The only significant witnesses who gave evidence at the trial were the Defendant and the defence expert, Dr Irvine. We do not propose to summarise the content of the transcript of the evidence. 11. However, a few remarks can be made. First in relation to the agreed facts they were considered by the Appellant and his advocate at the time, and indeed there is a contemporaneous email to that effect to the Crown's Legal Adviser. Further in evidence before the Relief Magistrate the Appellant's trial advocate (paragraph 16 of the transcript) asked the Appellant questions about the agreed facts

and the course of evidence and prefaced his first question with "this is a document that you and I have been through". In particular, he asked him about the agreed fact in respect of the Appellant returning to his vehicle to retrieve his telephone (page 16 of the transcript). 12. The Relief Magistrate heard medical evidence from an expert, Dr Irvine, which, in many respects, supported the Appellant's contentions and evidence which is the subject of his application to adduce fresh evidence and would serve to bolster that evidence in certain respects. 13. The Defendant in evidence said that he did have a "bump on my head" (page 23 of the transcript) as a consequence of the accident. One of the features of the evidence was that one of the two forensic medical examiners who examined the Appellant, Dr Evans, appeared to have made no such finding when she examined the Appellant shortly after the accident, and this was explored by the Crown when the Appellant was cross-examined (see page 35 of the transcript). The prosecuting Legal Adviser put it to the Appellant that this examination took place fourteen or fifteen hours after the collision and that there was no mention of a bump to the Appellant's head, and that accordingly it was suggested that the bump did not exist. The Appellant said "she could have missed it out when she wrote this statement"; and noted that the doctor had gone on to say that there is a possibility that 'I have concussion'. 14. The statement of Dr Evans, dated 23rd of March 2019, which was before the Relief Magistrate, indicated that the Appellant was, shortly after the accident, unfit for interview and that the symptoms he described were consistent with concussion. She said at paragraph 11.7:- "Ronnie Khan declined formal injury documentation." It perhaps was not fully understood what was meant by that statement at the time. However, it is now known, owing to Dr Evans' second statement dated the 22nd November 2019, that the Appellant's decision to 'decline formal injury documentation' meant that Dr Evans 'therefore did not include observation of a head injury' in 'her initial statement'. She now confirms that her notes document a 6 - 8 cm x 1 - 2 cm abrasion the left side of the head. It is surprising that Dr Evans did not list the head injury when she did choose to list other minor injuries which the Appellant exhibited. 15. In any event, the Relief Magistrate had before her the evidence of Dr Irvine and his report dated 24th May 2019. Dr Irvine is a forensic medical expert. He had before him various witness statements including the statements of Dr French, Dr Evans and a letter from Dr Terry. He noted that there were four medical reports "all confirming the consensus view that [the Appellant] was suffering from concussion, or subsequently post-concussion syndrome, as a result of the collision". He went on to examine the Accident and Emergency medical records of the Appellant when he attended for examination forty-eight hours after the accident at approximately 3 a.m. on Tuesday 9th October 2018 and was described, having been examined in the presence of his stepmother, as being, in her words 'not himself'. There is reference in the A&E records to the Appellant complaining of feeling confused, that his speech was slow, and complaining of other pains consequent upon the accident. 16. Perhaps of most significance are the triage details taken by a nurse at 20.32 hours on the 8th October 2018 which record:- "Patient involved in [road traffic collision two days] ago, patient states they crashed their car in a 30 mph zone, patient doesn't think they were doing over the limit. [Loss of consciousness] at the time as patient states they woke up in a ditch and walked away from the crash site. Remembers walking away from crash site with friend. Police then tracked patient down on Sunday. Patient states they were reviewed by police doctor on Sunday. Patient now [complains of] mild confusion,

headaches and nausea." This would appear to indicate a reasonably good recollection of the incident followed by mild confusion. The Appellant was seen several hours later by the doctor in A&E, as referred to above, and discharged without any treatment required. 17. The Appellant's GP, Dr Terry, said that the Appellant first attended upon him on the 8 th October 2018, the day after the collision, and was described as having been emotional, suffering from panic attacks and with poor concentration. On the 16 th October, Dr Terry thought that the Appellant's symptoms were suggestive of ongoing post-concussional syndrome. 18. Dr French, an experienced forensic medical examiner working for the States of Jersey Police, examined the Appellant on the th October 2018, and even at that stage the Defendant scored 8 out of 28 in a cognitive impairment test (0 - 7 being normal), with evidence that he was having difficulty with recall and concentration. 19. Dr Irvine says that concussion is often referred to as a mild traumatic brain injury which may or may not be associated with the loss of consciousness. Concussion can result in significant evidence of impairment in terms of memory loss, difficulty with thought processes, concentration and mood changes. 20. Dr Irvine concluded that it is highly likely that the Appellant, in his concussed state, would have been confused, disorientated, suffering from memory loss, headaches and difficulty in concentration, all of which could have been an explanation for his failure to consider the issue of reporting the collision to the police. 21. His evidence was not accepted by the Crown and he was cross-examined. 22. He said in evidence (page 42) "concussion per se is mild traumatic brain injury following a head injury of one sort or another" . He went on to say (page 44) "I am only able to assist in so far as concussion per se would result in a degree of confusion, memory loss, disorientation, mood change, thought process disorder, all of which could result in a collision and a person not acting in their normal rational manner" . Presumably when he said "in a collision" he meant "from a collision". 23. He went on to say at page 45:- "The concussion per se, if he had sustained the type of head injury we're talking about and he was suffering from concussion, there is a high likelihood that he could have been suffering from a degree of confusion, disorientation and an inability to think and behave rationally." 24. He said that he would have expected a bump on the Appellant's head to have been found by the examination by Dr Evans. Towards the end of his evidence Dr Irvine said that:- "One thing you have got to remember, of course, is that this, this action is alleged to have occurred very soon after the accident and the alleged head injury and, of course, head injuries, the consequences of head injuries don't manifest themselves immediately. There is a delay between impact or the acceleration / deceleration type of injury and the onset of the effects of concussion and such so that it may be - and, again, I am speculating here - that immediately after the accident he wasn't suffering from the immediate effects of concussion; they came on moments or minutes or a short time later and he may well have acted slightly more rationally or reasonably and with conscious thought immediately after the accident and that various symptoms or signs of concussion developed over a period of time." The decision of the Magistrate 25. Although much of the closing speeches focussed on the medical evidence in this case, it is clear from the brief reasons given by the Relief Magistrate when she returned with her verdict of guilty, that the Appellant had not discharged the burden of proof that lay upon him in respect of his conduct immediately after the accident. She said (page 59 of the transcript):- "I will obviously go into full detail in the Judgment but I can explain briefly my reasons. The principal reasons are

his behaviour immediately after the incident itself and I consider them not to be consistent with an inability to think rationally. He exited the car in a hurry because he thought there was smoke. He returned to the car specifically to get his phone. He then left the scene on foot, initially saying he was going to his boyfriend's, but in fact found his way, quite a considerable way, to his neighbours. Significantly, he didn't go home where the police could have found him and then, when the police called, he refused to say where he was. The medical evidence cannot prove concussion as it is based entirely on the defendant's words and, even if it could, then the potential impact on him of concussion would not in my opinion outweigh his actions at the time." 26. In her reasoned judgment the Relief Magistrate correctly identified the key issue as this " The Defendant's defence was that immediately after the accident he was suffering from concussion and was not able to form the intent to seek to avoid his liabilities. " She then went on to summarise the agreed facts and the evidence that she had heard. She recorded that the Defendant said "he maintained that he had a bump on his head after the accident " . The Relief Magistrate said, when considering the evidence of Dr Irvine , " There is evidence of the Defendant's account being unreliable in that he says he had a physical bump to his head which he told the doctor about. She [Dr Evans] did not, however, record this in her report, whilst she did record other physical injuries" . This finding of the Relief Magistrate now cannot stand, as it is incorrect. 27. Most of the medical evidence before the Relief Magistrate is not affected by the new evidence which is sought to be adduced. For example, the Relief Magistrate noted that when the Defendant attended the Accident and Emergency department on the 7 th October 2018:- "The only objective tests showed no sign of concussion in that he is described as looking well, orientated to time, person and place, and could name the months of the year in reverse order. There was nothing 'focal' on examination. Whilst the A&E doctor concluded there was concussion, it was clearly based on Defendant's words." 28. The Relief Magistrate ultimately determined at paragraph 25:- "In conclusion I did not find the medical evidence with regard to concussion established on a balance of probabilities." 29. However, she went on to say at paragraph 26:- "Even if I had been satisfied with regard to the evidence of concussion I would not have accepted that the effects of any such concussion were impacting on the Defendant at the time he left the scene. This is because his actions at the time were inconsistent with an inability to think rationally caused by concussion. He got out of the car quickly because he thought there was smoke. He then returned to the car to get his phone. He then left the scene and his passenger believes mentioned going to his boyfriend's house. He did not go there but went instead to his neighbour's house. It is significant that he did not go home which would have been perhaps the natural place to go and somewhere he could have been found by the police. It is significant that he found his way to his neighbour's house despite his claimed confusion and disorientation rather than wandering aimlessly. It is also very significant that when called by the police he 'refused', as stated in the admissions, to tell the police where he was. I conclude that all these actions are deliberate actions which require rational thought and are not consistent with the confusion and disorientation that immediate onset concussion would have brought. They are also actions which point to the Defendant seeking to avoid his criminal or civil liabilities it being noted that he was described as looking intoxicated by a witness at the scene." The relevant principles derived from case law 30. In *Hume v AG*

- [2006] JCA 162, the Court of Appeal listed at paragraph 17 of the judgment the relevant principles to be adopted by the Court of Appeal when considering applications for the reception of fresh evidence. It was agreed that the same principles are applicable on appeal from the Magistrate's Court to the Royal Court. The principles to be applied are:- "(i) the evidence sought to be adduced should have been unavailable at the trial (in particular the Court would be slow to hear evidence of a Co-Accused who could have been called at the trial); (ii) that evidence had to be relevant; (iii) it had to be capable of belief; and (iv) if the evidence had met these criteria the Court would go on to consider whether there might have been a reasonable doubt in the minds of the jury as to the Appellant's guilt had that evidence been given at the trial. Each case had to be considered on its own facts but in general the reception of fresh evidence before the Court of Appeal should be considered wholly exceptional." 31. There were also criticisms of the conduct of the Appellant's trial advocate in this case. He has sworn an affidavit dealing with those criticisms. He also gave evidence before us. 32. It is important to have in mind considerations of the conduct of counsel, where such conduct is impugned, as evidence which might have been available at trial may have been overlooked by incompetent counsel with significant results for an Appellant. 33. In *O'Neill v AG*
- [2018] JRC 199, at paragraphs 10 and 11 the Royal Court said:- "10. The test was also referred to by the Court of Appeal in *Bennett -v- AG*
- [2015] JCA 019 where Perry JA said this:- "4. Before we turn to consider the issues that arise for determination in this application, it may be helpful at this stage to say something about appeals based on the conduct of lawyers. There is no doubt that an error, or errors, on the part of an advocate may lead to the quashing of a conviction, provided that the error has resulted in a miscarriage of justice (to use the language of the Court of Appeal (Jersey) Law 1961). A number of formulations of the test for determining whether an advocates' conduct is sufficient to lead to the quashing of a conviction can be found in the authorities. In *R -v- Ensor*
- [1989] 2 ALL ER 586 it was suggested that the advocate's conduct must be 'flagrantly incompetent', while in *R -v- Richards*
- [2000] ALL ER(d) it was suggested that the test to be applied in relation to the conduct of the lawyer was 'Wednesbury unreasonableness', a reference to the decision in *Associated Provincial Picture Houses Limited -v- Wednesbury Corporation*
- [1948] 1 KB 223. In *R -v- Clinton*
- [1993] 2 ALL ER 998, the English Court of Appeal (Steyn LJ, Garland and Rous JJ) recognised the difficulties associated with such tests and stressed that what mattered was not the extent or quality of the advocate's error, but whether the conduct affected the safety of the conviction. To put this another way, the issue is whether the conduct of the lawyer has rendered the trial unfair; see *Boodran v State of Trinidad and Tobago*

[2002] 1 Cr App R 103. Transposed to this jurisdiction, it would be necessary to consider whether the advocate's error was such as to have led to a miscarriage of justice.

5. In Clinton , supra, it was stated that if the decision of an advocate is taken in good faith, having weighed the competing considerations and having consulted his client when appropriate, the Court of Appeal is much less likely to interfere than where the decision is taken in defiance of instructions and without reference to the client." 11. The Royal Court in Le Pavoux -v- AG

[2016] JRC 115 added this: "40. Although the provisions in the Magistrate's Court (Miscellaneous Provisions) (Jersey) Law 1949 relating to appeals from the Magistrate's Court to the Royal Court are not expressed in the same way as the appeals to the Court of Appeal under the Court of Appeal (Jersey) Law 1961, we consider that the approach which has been adumbrated by the Court of Appeal in Bennett -v- AG to be applicable to Magistrate's Court appeals as well. The questions we have to ask ourselves are firstly whether we are satisfied there have been any advocate's errors, and secondly whether, if so, the result has led to a miscarriage of justice." 34. Accordingly, it is necessary for a court to identify an error on the part of trial counsel which has given rise to a miscarriage of justice sufficient to warrant quashing the conviction and allowing the appeal. 35. It is necessary to have in mind how the allegations regarding the competence of counsel relate to the application to adduce fresh evidence in this case. In summary, if as the Appellant's advocate argues, we accept that trial counsel has been guilty of an error potentially giving rise to a miscarriage of justice then it amounts, principally, to a failure to call evidence that was available at trial. The advocate's failure to call such witnesses, if that such failure was culpable, means that such witnesses were not available in the true sense of the word. Accordingly the first of the four limbs and the tests set out in Hume v AG would be satisfied upon such a finding. However, the Court would be unlikely to find that counsel had committed a culpable error unless such evidence was also relevant and capable of belief, thus satisfying the second and third limb of the test for admission of fresh evidence. Counsel's conduct is only capable of being sufficient to lead to the quashing of the conviction if the error is such as to have led to a miscarriage of justice which is similar but not identical to the fourth limb of the test for the admission of fresh evidence. Applying the law to the arguments advanced on appeal in this case 36. It is appropriate to examine the principle complaints made by the Appellant separately before then considering, if they are well founded, their cumulative effect on the safety of the conviction of this case. The agreed facts 37. There are two agreed facts which are the focus of complaint. The first is the agreed fact number 13 in relation to the Appellant's phone. In his affidavit the Appellant says:- "32. On 28 August 2019, Advocate Hillier emailed me about the trial and attached a copy of the draft Agreed Facts. A copy of that email and the Agreed Facts are at pages 47 to 53 of MRK1. The Agreed Facts contained a statement which said "The defendant ran back to the car to retrieve his telephone". This information can only have come from Charlotte's statement but it is incorrect as it positively asserts that the reason I went back was to collect my telephone, when she only ever speculated that this may have been the reason.

33. I recall that we discussed whether Charlotte's evidence regarding the telephone should be in the Agreed Facts as Advocate Hillier had suggested I probably did go back to get it as people are so attached to their phones these days. I must have accepted Advocate Hillier's advice that Charlotte's evidence should go in to the admissions. However, at that time, I did not notice the error or appreciate its significance." 38. In evidence before us, when he was cross-examined, the Appellant said that he had met with Advocate Hillier to discuss agreed facts in August 2019. At this time he no longer suffered any post-concussion syndrome. He had said that he had seen Miss Bunyan's statement and that after he had met with Advocate Hillier in relation to the agreed facts, which meeting is recorded in a contemporaneous file note prepared by Advocate Hillier dated 28 th August 2019, he received an email the following day from Advocate Hillier in which he was provided with a copy of the email that Advocate Hillier had sent to the lawyer for the Crown on the 29 th August, in which Advocate Hillier said "I have been able to meet with my client and discuss matters at length with him including your email, the appended draft documents, and matters generally". The draft documents included the revised bundle index, the billet and witness billet (confirming that only his client and the expert would be giving evidence), and that the facts were agreed save for two matters which are not a concern of the Appellant. Advocate Hillier even noticed a typo on the final page of the draft agreed facts, suggesting a careful reading of the document. He also, and this is relevant to the issue of witnesses / referees to which we will return subsequently, said in the same email "I recognise my client is obtaining references from family / friend members, but I have not received the same at this time". 39. Advocate Hillier dealt with the agreed facts both in his affidavit and in evidence. As to the agreed fact in relation to returning to the car to collect the mobile phone, he said that was a matter that the Appellant could not recall, and had originated from Miss Bunyan's statement to the police. In evidence, Advocate Hillier said that he had surmised that the Appellant must have returned to the car to collect the phone. He accepted that the agreed fact was more definitive than the statement of Miss Bunyan, but it was based on what the Crown had drafted and what he had discussed with the Appellant. He accepted that the agreed fact did not reflect the statement of Miss Bunyan. 40. The Appellant, in evidence, stood by the account he gave in his affidavit. As regards the refusal to provide his location to the police, the Appellant in his affidavit sworn for the purpose of this application, says:- "34. A further agreed fact which I feel should not have been admitted into evidence was my alleged refusal to tell the police where I was when they telephoned me a short time after the accident. Firstly, having reviewed my papers and the copy of the file I have been given by Advocate Hillier, I do not believe that I have ever seen a police statement which confirms this alleged refusal. It is therefore unclear to me how this could have been agreed if there was no evidential basis but I did not appreciate this at the time." 41. The Court was provided with much of the prosecution's file which went to support the agreed facts and that includes a statement of Detective Constable Martin Davies dated the 20 th May 2019, which says:- "8. At 00.55 hours we returned to Khan's home address, however he still wasn't present. Whilst at the address a telephone call was made to Khan to establish his welfare and whereabouts. He was spoken

to by myself and PS Royle, but refused to tell us where he was and seemed surprised that we wanted to speak to him." 42. As to this telephone call, Advocate Hillier said in evidence that he could not recall whether or not he had seen the statement from the police at the time. He had noted the allegation from the Police Report which he accepted was not evidence in itself. Advocate Hillier said that the Appellant said that he could not recall the police telephone call, but that he did not dispute that it had been made. 43. The Court's view in respect of the complaints regarding the agreed facts is as follows. 44. As to the agreed fact in relation to the telephone call from the police, in our view no complaint can be made. The Appellant was unable to challenge the statement made by the police officer on his account, and it was quite proper for this advocate, having discussed the matter with him, to agree this fact on his behalf. Whether or not Advocate Hillier saw the statement of Detective Constable Davis at the time, any error had no practical consequence for the Appellant as the admission was made in accordance with that statement. 45. As to the agreed fact in respect of returning to the vehicle to collect the telephone, plainly care was required as this was a fact recorded in different terms to the prosecution evidence. Nonetheless, there is no doubt that this and all the agreed facts were discussed by the Appellant and his counsel, and the agreed facts were sent with other documentations to the Appellant the following day and he could, if he had felt appropriate, have taken issue with them at that point. Although it does not, as Advocate Hillier accepted, affect the nature and quality of the duties he owed to his client, the Appellant was at that time working for a law firm and had passed his criminal law module on the distanced learning university degree course that he was then studying for. He also had some, albeit, limited experience of criminal litigation in the course of his practice, and accordingly was at least well placed as another member of the public to consider whether or not to take issue with the agreed facts presented by the prosecution, at least two of which were rejected on his behalf. Nonetheless prosecution and defence are under a duty to ensure that agreed facts reflect the evidence in particular the evidence given from witnesses in their witness statements. The prosecution should generally be cautious about attempting to agree all the evidence in agreed facts, and should also exercise some caution in making decisions not to call key witnesses who were present at the scene. If they chose not to do so then it is essential that facts are accurate. Agreed fact 13 ought to have read " the Defendant returned to the car, possibly in order to retrieve his mobile telephone " or words to that effect. We find to have agreed this admission in the terms that it was agreed was an error on the part of defence counsel. The additional medical / expert evidence 46. This comes in two forms; additional evidence from Dr Evans and additional expert evidence from Dr Irvine. No one is to blame for the fact that there was an omission in the original expert report of Dr Evans. However, the effect of her second statement dated the 22 nd November 2019 is set out above at paragraph 14. The Appellant argued, and the Court agrees, that Dr Evans' further evidence would have bolstered the evidence of Dr Irvine. That much is clear from the addendum forensic medical report from Dr Irvine dated the 19 th March 2020 which considers not only the additional statement of Dr Evans, but also the witness statements and letters from witness B, witness A and witness C. This additional evidence

is summarised by Dr Irvine in his report. Dr Irvine says: "6.1 It is clear, from my initial report in this case, that, on the basis of the four independent medical opinions available at that time, I supported the opinion that Ronnie Khan was, immediately following the incident and subsequently, having been showing evidence of signs consistent with, and supportive of, having been concussed. 6.2 Although they were not available at the time I prepared my initial report, it is now clear that there was evidence available, from a number of friends and relatives, who provided both letters for the defence advocates, and subsequently witness statements, that lend further support for Ronnie Khan having been concussed. 6.3 It is clear that they all provide details of Ronnie Khan having, shortly after the incident, been confused, disorientated, failing to make sense, having slurred speech, and difficulty with communication." 47. In his conclusion, Dr Irvine said:- "7.5 There is therefore, overall, further evidence to lend support for Ronnie Khan having sustained a significant head injury, and also subsequently having presented with signs, symptoms, and behaviour, consistent with, and supportive of, having been suffering from concussion which had then been confirmed during independent medical assessments on at least four separate occasions." 48. This additional medical evidence is, in the Court's view, evidence that was unavailable at trial, relevant and capable of belief. Accordingly it satisfies three of the four limbs of the test in *Hume -v- AG*. Whether it satisfies the fourth and final limb will be considered below when we consider the evidence of the lay witnesses who the Appellant says also ought to have their evidence admitted on appeal. The three potential defence witnesses 49. The three witnesses were respectively witness A, an ex-partner of the Appellant, his step-mother witness C and a neighbour and friend of the Appellant witness B who, at the time of the accident, lived in a flat next door to the Appellant. 50. The former partner sent a letter described as a 'character statement' to Advocate Hillier on the 3rd September 2019 just before trial, as requested by Advocate Hillier. He subsequently produced a witness statement to the Appellant's counsel. Witness A saw the Appellant within half an hour of the accident after the Appellant walked to St Helier, the Appellant having telephoned him after the accident. Witness A describes the Appellant as "dazed, vacant and disorientated" and gives details of the journey to the home of the neighbour, witness C, who was, at the time, the Appellant's best friend. He was with the Appellant and witness C for an hour before he left witness C's home and accordingly would have been at her home when the police telephoned the Appellant at 00.55 a.m., although he says nothing about it in his statement. Neither he nor witness C say anything about the fact that, on the Appellant's account to his advocate, as contained in the file note (the matter which was not in evidence at trial but was disclosed on the appeal) that he had two glasses of vodka after the accident, evidently at the home of witness C. 51. Witness C also wrote to Advocate Hillier on the 1st August 2019 to provide a 'reference' for the Appellant. She subsequently produced a witness statement to the Appellant's counsel. Her front door is only two metres from the Appellant's home address. She describes that on the night of the collision the Appellant left her home with Miss Bunyan and she was surprised to see him at her home later on. The Appellant spent the night at witness C's house and not at his own home next door because, witness C says, they agreed "his mother may not help

the situation and may make [the Appellant] worse". She thought that the Appellant was having a panic attack and says that he was unable to tell her what had happened as he was "not making any sense". 52. Finally the Appellant's step-mother witness B also produced a 'reference' to Advocate Hillier on the 28 th August 2019 and then subsequently made a witness statement. She was expecting to give evidence for her step-son at his trial. She was worried about the change in the Appellant that occurred after the accident; slurred speech, inability to recall the events of the night, confusion, lack of appetite, dizziness, and other symptoms that concerned her and led her to taking the Appellant to the Accident and Emergency department to be seen by a doctor. She said it took him about four months to regain his confidence and generally recover from the accident. 53. It was said that all that these witnesses provided objective evidence of the concussion sustained by the Appellant that would generally support his credibility. It is said "It is abundantly clear that had they been called to give evidence, these three witnesses could have provided clear and objective evidence as to how the Appellant was presenting following the accident. Not only would [they] have also confirmed the head injury, but all three witnesses would have provided evidence which may have led the Relief Magistrate to reach a different conclusion as to whether the Appellant was acting rationally following the accident." 54. The emails passing between the Appellant and Advocate Hillier prior to the trial were considered, and it is clear that the Appellant saw the witnesses as potential witnesses in his defence, whereas Advocate Hillier perceived them to be character witnesses only. He felt that this evidence would be relevant, if at all, in the event of the Appellant being convicted. 55. Advocate Hillier accepted in evidence that some of his email correspondence with the Appellant might have been confusing for the Appellant. As late as the 16 th August 2019, the Appellant wrote to Advocate Hillier saying "Did you contact any of my witnesses which you said may be able to help? I am conscious of time". 56. Advocate Hillier wrote to the Appellant on the th August 2019. In his email he drew a distinction between witnesses who were to give evidence including the Appellant himself, and 'character references'. He said " We will need to file them as part of this process. If you can confirm who they are I can then make contact and obtain their statement. " Advocate Hillier accepted that the reference to 'statements' and 'references' would have been confusing for the Appellant and nowhere in the correspondence did he properly explain to the Appellant that the character evidence he was gathering was only for the purpose of sentence (as it was ultimately used) and not for the purposes of trial. Indeed, as late as the day before trial, when the character evidence / witness evidence had been obtained, Advocate Hillier wrote to the Appellant saying:- "I will prepare the references to hand up and we can decide on the day if you wish them to be presented or not. I think they are helpful but we can talk all this through whenever convenient for you." This email was difficult even for members of the Court to understand as if the purpose of the character evidence was for it to be deployed only if there was a conviction it was difficult to see how and why it would be submitted in the course of the trial the following day, particularly in circumstances where no notice had been given to the Crown as to whether or not they would be content with such evidence being read to the Relief Magistrate. 57. However, it

was clear that Advocate Hillier had given thought as to whether or not these should be character witnesses or witnesses as to fact to be called in the course of the trial. Advocate Hillier said in evidence that the key issue for him was the question of the Appellant's intent immediately after the accident, and the essential evidence in respect of the concussion that he may have sustained came from Dr Irvine and the Appellant. He said that he considered whether or not the other witnesses should be called as defence witnesses. His view was that they were character witnesses because they did not witness the accident and their evidence was simply not relevant to the question of the Appellant's intent immediately after the accident. The members of the Court found that that was a reasonable view for him as trial counsel to have taken, but it is unfortunate that that view was not conveyed more clearly or explained sufficiently to the Appellant. Advocate Hillier should have been clearer in his advice in this regard and should have explained the distinction between trial witnesses and character witnesses to be called only in the event of a conviction and subsequent sentencing hearing. He should have also explained why character evidence was not admissible as defence evidence in the case of this Appellant as (although we did not have sight of the defendant's antecedents) presumably there were good reasons why the Appellant was unable to call character witness to bolster his credibility as a witness in this case. He should also, notwithstanding his view that it was unnecessary to do owing to the Appellant's absence of recollection, have prepared a proof of evidence for the trial, and we regard it as generally good practice for a proof of evidence to be sought from any defendant who is facing a criminal trial. Conclusions 58. Counsel made an error in respect of agreed fact 13 which should have been in different terms as set out above. 59. The further medical evidence was unavailable at trial, relevant and capable of belief. 60. Counsel's decision not to call the defence witnesses was, on balance, understandable, and not an error. 61. Counsel did fall into error in not adequately explaining the trial process to the Appellant and the difference between a defence witness as to fact in a trial and a defence witness as to character which would only be relevant, on the facts of this case, on sentence, or in certain cases to support evidence of good character adduced by a defendant. 62. Cumulatively, the errors that were made by defence counsel did not, in the Court's view, lead to a miscarriage of justice in this case. 63. In order to determine whether the fresh medical evidence and an admission in respect of the return to the car to collect the telephone in different form may have led to a different verdict, we have applied the fourth limb of the test in *Hume -v- AG* . We have revisited the decision of the Relief Magistrate on the footing that such evidence was before her and asked ourselves if she might have come to a different decision. 64. Paragraph 26 of the judgment of the Relief Magistrate is set out above at paragraph 31. The Relief Magistrate made clear in this paragraph that she felt that on the evidence the Appellant had failed to establish the statutory defence even if the medical evidence (as now appears to be the case) was conclusive as to the fact that he suffered concussion as a consequence of the accident. Counsel for the Appellant dissected paragraph 26 of the judgment and made submissions to the effect that not all the matters set out therein have withstood scrutiny on appeal, particularly the agreed fact in respect of the return to the vehicle and the

reasons for the Appellant choosing to go to his friend's house and not to his home address. 65. However, on the evidence before the Relief Magistrate and before this Court, the following evidence as to the Appellant's actions immediately after the accident are established, namely that the Appellant:- (i) left his car; (ii) returned to the vehicle, possibly in order to retrieve his mobile phone; (iii) he then made his way home which was a long walk in itself (we now know from the further evidence that the Appellant would have wished to adduce that after the accident he also telephoned his ex-partner on his mobile phone, agreed to meet him in St Helier and did so before going to the house of the neighbour); (iv) walked with his ex-partner to the home of his next door neighbour who lived extremely close to his step-mother; (v) received a telephone call at 00.55 hours from the police and refused to say where he was 66. Having regard to the facts that are established on any view in this case, the members of the Court consider that evidence that the Appellant wishes to adduce, even if admitted, would not have led the Relief Magistrate to determine the case differently. 67. Accordingly the appeal is dismissed. Authorities Road Traffic (Jersey) Law 1952. *Hume v AG*

[2006] JCA 162 . *O'Neill v AG*

[2018] JRC 199. Page Last Updated: 23 Jul 2020 BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII

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