

JERSEY / JUDGMENT

Marquer -v- AG [2017]

JRC 002 (05 January 2017)

[2017] JRC 002

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JUDGMENT

THE BAILIFF:

Introduction

1. The Appellant was convicted before the Assistant Magistrate on 19 th September, 2016, of three offences:- (i) Failure to stop, contrary to Article 51(1) of the Road Traffic (Jersey) Law 1956 (the "Law"); (ii) Dangerous driving contrary to Article 22(1) of the Law; and (iii) Failure to provide information as to the identity of the driver contrary to Article 86(1)(b) of the Law.
2. As was put in the contentions of the Appellant, in short his defence was that he was not driving the vehicle in question at the relevant time, nor did he know who was driving it, because the vehicle had been taken by an unknown party. The evidence 3. Many of the material facts were not subject to any significant dispute. The car in question was a Renault Clio registered to a Ms Zoe Cauvain, the girlfriend of the Appellant's brother Liam Songhurst. At about 6.30pm on Saturday 27 th February, 2016, the Appellant borrowed the Clio with Ms Cauvain's permission. He claimed that he drove it to the White Horse Public House where he had dinner with some friends, and at or about 10pm he drove to the property where he lives with his mother and left the car there. He and his friend Mr Nicolas then were given a lift to Mr Nicolas' home in St Peter by Mrs Songhurst, the Appellant's mother. They arrived there at about 11.20pm. Mrs Songhurst returned home, but the Appellant and his friend spent a couple of hours there before getting a lift to Roberts Garage at Springfield, from where the two of them walked into town. They had something to eat, and later met with two girls through a dating app, spending the night with those girls at a house close by Romeril's store in town. He said that he was collected by his mother, having telephoned her at about noon the following day. He spent the afternoon at Primrose Hill relaxing before going with his brother to a friend's property to collect the Renault Clio. He drove the car to his interview at Police Headquarters. He asserted he had not driven it at any time between parking it at Primrose Hill on the Saturday evening and collecting it at about 6pm on the Sunday. The Appellant gave evidence on his own behalf and his mother Mrs Songhurst and his friend Mr Nicolas also gave evidence essentially supporting what he had said. 4. The prosecution case was that at half an hour after midnight on Sunday 28 th

February, a police officer saw the vehicle being driven west along Longueville Road which has a 30 mile per hour speed limit. The police officer considered the vehicle was driving at an excessive speed and he followed it. A check was made with the Force Control Room which revealed the Renault Clio to be registered to Ms Cauvain. The police officer noted there were two occupants, both of them male with dark hair. 5. The police officer gave evidence that he followed the vehicle for some time. It clearly drove in excess of the speed limit, ignored the emergency lights and siren and generally drove in a dangerous manner at an excessive speed. The officers followed the vehicle up to Mont Millais but it was going too fast for them to catch and they were advised to cease any further pursuit. 6. At 12.45am, Police Sergeant Quenault attended at Primrose Hill Cottage and spoke with Ms Cauvain. He was advised that the Appellant had borrowed the vehicle and that she did not know where he was. There was no sign of the vehicle at the property. At 12.55am, Police Sergeant Fitzgerald, on duty in the Force Control Room, telephoned the Appellant. The Appellant said that he was in town with friends. He said that the vehicle was at the property, but that it might have been stolen. He was told by PS Fitzgerald to come immediately to Police Headquarters, but he refused to do so saying he was unavailable. When asked about the Renault Clio, he said he was not driving it and the car must have been stolen. 7. The Appellant was interviewed under caution on Sunday 28th February at just after 9pm. He was guarded in his responses, refused to name the people with whom he had been in the period after he had borrowed the vehicle, but he agreed that he had collected it that afternoon and that it was back in his control. Immediately after the interview, a police officer went to the car park of the Savoy Hotel across from Police Headquarters where he found the vehicle, which had been parked there by the Appellant. The key to the vehicle was located on the front offside wheel. When the officer served a notice under Article 86 of the Law requiring information as to the identity of the person in charge of the vehicle at 12.30am on Sunday 28th February, the Appellant replied that he did not have the information to give. 8. The Appellant's brother gave evidence that the Appellant had borrowed the vehicle early on the Saturday evening and that he heard it at the property at about 10.30pm, but that he did not hear it again. He said that he and Ms Cauvain had received a phone call and then a visit from the police that evening. They had given the Appellant's details to the police and he had no further involvement until the Appellant asked him at about 5.30pm the following day to collect the vehicle with him. His evidence was that the two of them went to Bel Air Lane near Grainville School, and entered a property through its black automatic gates. The vehicle was parked there and appeared to be in a normal state. The Appellant gave him the keys and he drove the vehicle home. Thereafter the Appellant drove the vehicle to Police Headquarters. 9. When the Appellant gave evidence, he said that he did not drive the vehicle at any time between parking it at the property on the Saturday evening and collecting it at about 6pm on the Sunday. He was therefore not in a position to give any information about the course of driving witnessed by the police officers. He could not remember how he knew where the vehicle was parked. He thought maybe he had been informed on the night out, or maybe he just assumed he should check at "Jamie's house" due to his house being a property being like that in which the Appellant lived, namely that people just turn up and leave vehicles. He was

not particularly concerned that the Renault Clio had been taken as he described it as "only a banger of a car". When cross-examined about how he got the key he said that it was more than likely on the front right wheel, or even left in the vehicle. He passed the key to Mr Songhurst. He may just have heard where the car was, rather than being told on a one on one conversation. He said that he knew where the key was because that was a common place for people in his family to leave keys. 10. In her evidence corroborating that of the Appellant, his mother said that she had taken him and Mr Nicolas to St Peter on the Saturday evening. The day stuck in her mind because the next day she was due to go to a belated birthday meal. When she was asked about weather conditions she said that it was often miserable in November. The Assistant Magistrate noted that she said in re-examination that this was a slip of the tongue, saying she meant to say February. The evidence of Mr Nicolas also corroborated that of the Appellant. He said that they were dropped at Roberts Garage at about 1am. He was less sure than the Appellant as to what had taken place that evening because he had been drinking and he said that he had "blanks". He remembered the evening but not all of the detail. The decision on the evidence 11. The Assistant Magistrate retired and considered the evidence. When he returned he convicted the Appellant on all three counts, giving brief reasons indicating that a full written judgment would be handed down in due course. This judgment was delivered some three weeks after trial on 6 th October. The Court finds that it is an extensive and well-reasoned judgment. 12. Advocate Steenson, who did not appear before the Assistant Magistrate, really advanced two grounds of appeal. The first was that the Assistant Magistrate had failed to treat the "alibi" evidence of Ms Songhurst and Mr Nicolas properly. The second was that there had been a failure on the part of the prosecution to make proper disclosure. 13. In his contentions it was also submitted that the Appellant's conviction was much against the weight of the evidence. In a sense, this is a similar contention to the oral submission that the Assistant Magistrate failed to treat the alibi evidence of Ms Songhurst and Mr Nicolas properly, for the "weight of the evidence" ground of appeal was really based upon the proposition that there was circumstantial evidence against the Appellant only, and the contention was that the direct evidence was that of Ms Songhurst and Mr Nicolas, which the Assistant Magistrate ought to have accepted. 14. In his judgment, the Assistant Magistrate concluded that the explanation of the Appellant - and indeed the defence evidence - was inherently implausible. It relied upon the proposition that somebody attended at Primrose Hill and removed the Renault Clio without permission, drove it dangerously and then returned it to the house where a friend of the Appellant lived, leaving the key somewhere near to hand, then somehow getting information to the Appellant as to where the car was so that he could collect it at 6pm the following day. He had no explanation as to how he might have considered the car had been stolen when he spoke to the police shortly after midnight on Sunday 28 th February, and yet knew the address from which to collect it later that day. The Assistant Magistrate considered the suggestion that the thief should have decided to park the vehicle at the home of the friend of the Appellant simply because the owners of that property are welcoming parents was bizarre. 15. In our judgment, the Assistant Magistrate's reasoning was perfectly logical, and we see no reason to conclude that his finding of guilt was therefore against the weight of

evidence. Although the Assistant Magistrate made it plain that he did not believe the evidence put forward by the Appellant or Mr Nicolas, he was not so critical of the evidence of Ms Songhurst. He noted that it was not strictly in the nature of an alibi and that it did not directly undermine the prosecution case. This is no doubt because it was perfectly possible, in terms of timing, for her to have delivered Mr Nicolas and the Appellant to St Peter at approximately 11.15pm, and for them to have been driving the Renault Clio on Longueville Road at 12.15am. Nonetheless it is clear that the Assistant Magistrate did not regard Ms Songhurst as an intrinsically reliable witness. He mentions in his judgment that it was not clear whether the events she described occurred at the times or even on the day that she suggested, and he pointed to her "slip of the tongue" when she explained why she remembered the day because she was engaged in arranging a friend's wedding in November. He also recalled that she made a mistake when she said that the Appellant had telephoned her to be asked to be collected on Sunday morning, when the call log showed that she in fact had telephoned him. 16. The Assistant Magistrate rightly confirmed that simply because he had not accepted the Appellant's explanation, and simply because he found that the Appellant had lied, it did not follow that he was guilty of any of the offences. The burden of proving the offences to the criminal standard still rested on the prosecution. 17. The key submission made by Advocate Steenson to us was that neither Ms Songhurst nor Mr Nicolas had put to them in terms by the Crown Advocate acting for the prosecution in the court below (not Ms Morley-Kirk) that they were lying. He submitted that if the Crown did not put it to the witnesses that they were lying then there was 100 years of case law that the witness should be taken to be telling the truth. None of that case law was unfortunately put before us. 18. In response, Crown Advocate Morley-Kirk agreed that it had not been put either to Ms Songhurst or to Mr Nicolas that they had been untruthful, but as a matter of law the judge was not precluded from disbelieving witnesses simply because no challenge of lying had been made. She went on to contend that in fact a review of the transcript showed that the Crown Advocate did test the evidence which Ms Songhurst and Mr Nicolas gave with some extensive cross-examination

- how did the messages come to Ms Songhurst? What was she watching on television? Who was there? What were they wearing? Similarly the evidence of Mr Nicolas was tested in cross-examination. In those circumstances, it was the Assistant Magistrate to decide what evidence he accepted, and the failure to put explicitly to Ms Songhurst and to Mr Nicolas that they were lying was not critical. 19. It is well established that it is the duty of a party to put its case, because the witnesses are entitled to have the opportunity of giving their evidence as to whether that case is or is not to be accepted - see for example *R v Hart*

[1932] Cr App 202, a case of a jury trial where alibi witnesses have been called and were not cross-examined, where Lord Hewitt CJ said this:- "A remarkable feature of the case was that three of the witnesses for the defence ... were not cross-examined. If the jury accepted their evidence, it appears to be physically impossible that the appellant could have been at the spot in Trinity Road, Wandsworth, at the time of the assault on the warder. In other words, none of the witnesses was given the opportunity of dealing with any objections by

the prosecution to their evidence in chief. Nevertheless, when the trial approached its close, the jury were invited by the prosecution to disbelieve these witnesses. Without disbelieving them the jury could not have found that the appellant was present at and took part in the assault. Our attention has been directed to the summing up but in no passage did the Commons Sergeant mention the fact that these three witnesses were left without being cross-examined. Although it was, undoubtedly, explained to the jury that the defence was an alibi, nowhere were they clearly told what the difficulties of the prosecution must be if [their] evidence ... should be accepted ... nor was the fact that the witnesses were not cross-examined mentioned. In our opinion, if, on the crucial part of the case, the prosecution intend to ask the Jury to disbelieve the evidence of a witness, it is right and proper that that witness should be challenged in the witness box or, at any rate that it should be made plain while the witness is in the box that his evidence is not accepted. Here no questions were asked in cross-examination. Having regard to that matter, and also to the summing up, we have come to the conclusion that the conviction was unsatisfactory and cannot stand, and the appeal ought to be allowed." 20. In our judgment it is important to distinguish two points in this extract. The first is that it is the duty of counsel to challenge witnesses whose evidence is not accepted where that evidence is material to that counsel's case. The second is that the fault of counsel was compounded by the trial judge who did not sum up the position adequately to the jury as the finders of fact. The combination of those circumstances was such that the conviction had to be set aside. 21. By contrast in *Wilkinson v DPP*

- [2003] EWHC 865 (Admin) , the administrative court was dealing with an appeal by way of case stated against a decision of a district judge who found the appellant guilty of an assault occasioning actual bodily harm contrary to Section 47 of the Offences Against the Person Act 1861 . As Burnton J said, the course of the proceedings was unusual in that the prosecution called live evidence including evidence of the interview under caution of the appellant; that being given not by way of a transcript or summary, but by the playing of the audio tape of the interview itself. In that interview, the appellant gave her account of the incident in question which, if accepted by the district judge, would have led to a finding that she was not guilty. As is normal with interviews of this kind, the appellant was questioned by the police officers engaged in interviewing her. When the appellant gave evidence before the district judge, she confirmed that what she had said at interview was the truth. She was not cross-examined by the prosecution at all. She gave no other live evidence as to what had happened on the occasion in question. It was contended by the appellant before the district judge that as she had not been cross-examined, he was bound to dismiss the case against her - to accept her evidence that the account given in interview was correct, irrespective of his views as to the credibility of the prosecution evidence or indeed of her evidence in interview or before him. The district judge rejected that contention and convicted her. Burnton J said this:- "3. This case therefore raises issues as to the proper conduct of a prosecution by the advocate acting on its behalf, and as to the position of the judge where there is no cross-examination of a defendant in the

circumstances of the present case. It is important, in my judgment, to distinguish between the professional obligations of the advocates appearing before the court and the position of the court itself. It is undoubtedly the professional obligation of an advocate acting for the defence to put to prosecution witnesses conflicts between the defence case and the evidence given by the prosecution witness in question in order to give the prosecution witness an opportunity to comment on what is put: whether it is the possibility of a mistake or whether it is that the prosecution witness is lying, whether his recollection is incorrect, whether he has been confused or whatever. The position in relation to the defence case is somewhat different. By the time the defence comes to give evidence, the prosecution evidence has been given, the defence are aware of what evidence had been given and the defence are able, therefore, in chief, to ask witnesses whether or not they agree with the prosecution evidence and to comment on it. It is nonetheless the professional duty of the advocate acting for the defence to make it clear what evidence is rejected or disputed. That is particularly important where a trial takes place before a jury. It is less important where the trial takes place before a legally qualified judge who may be expected to be aware of what the issues are in a case.

4. At the beginning of this judgment I distinguished between position of the advocates acting in a criminal case and that of the judge. The judge of fact is entitled to reject evidence even if not cross-examined, whether that evidence is prosecution evidence or defence evidence. In deciding to do so he must take into account the fact that the witness had not had an opportunity to comment on the contrary case which might have been put to him in cross-examination. It will normally be appropriate for the point in issue to be expressly raised with the witness, but of course the judge must not descend into the arena and become either defence counsel or prosecution counsel by proxy. Those are the general principles as I can see them to be." 22. We agree. It is undoubtedly the professional duty of prosecuting counsel to make it plain to a defendant while he or she is in the witness box that his evidence is disputed. Apart from anything else, it will ensure that the defendant has an opportunity to explain matters in his evidence which might be relevant to his defence, and it therefore enables his full case to be presented to the finder of fact. It is possible, in an extreme case, that a failure to do so might lead to a conviction being set aside on appeal. However, the present case is far from extreme. The defendant was cross examined at length about his account. His witnesses did not have the suggestion put to them in terms that they were lying, but their evidence was tested and there was no doubt that all the defence witnesses were well aware what the prosecution case was. Furthermore, the finder of fact was a professional judge and not a jury, and he too was well aware of the evidential rules which bound him as a matter of law, many of which he referred to in the course of his admirable judgment. 23. In the circumstances, we find nothing in this ground of appeal. Disclosure 24. In his contentions, Advocate Steenson submitted that no schedule of unused material was provided in this prosecution, nor was any unused material supplied. Subsequent to the conviction, a significant amount of unused material has been supplied and, he contended, further material is awaited. In his contentions he submitted that the issue on an appeal

against conviction is whether, taking all of the circumstances of the trial into account, there is a real possibility that the court would have arrived at a different verdict had the necessary disclosure been made. In support of that contention he relied upon McGuinness (Paul) v HM Advocate

[2010] HRLR 17 Sc. The Archbold reference at paragraph 7- 91 on page 1183 formed part of the bundle on appeal, but the case itself was not produced. At the hearing, Advocate Steenson informed the court that he had received only very recently some fingerprint disclosure. The Court offered him an adjournment so he could consider it, but he said it was not for him to ask for an adjournment. He submitted that he did not understand what all material sent to him meant, and he was not sure that he had had everything. In his submission, the Crown had in fact accepted that material that should have been disclosed has not been disclosed. 25. The Court was faced on this appeal with no affidavit evidence - or any other evidence - but did have the advantage of contentions in writing from both Advocate Steenson and Advocate Morley-Kirk. Advocate Steenson objected to the Crown contentions in so far as they contained a reference to the detail of some of the unused material which, it was said, could suggest that things would have gone worse for the appellant had that material been before the trial court. Advocate Morley-Kirk contended that if the evidence had been disclosed, it would have damaged the Appellant's case as presented, and therefore the irregularity in disclosure, which she accepted, caused the Appellant no prejudice. 26. From the Crown contentions, it is clear that there was no disclosure of an unused material schedule. Apparently one was prepared as an internal document for the prosecutor's file. Unfortunately when the prosecutor received the file, he thought that the relevant material set out in the schedule would have been disclosed, and therefore he did not disclose it himself. This became apparent only shortly before the hearing before us. We have been told that in effect there were two categories of unused material - the first category related to forensic evidence. Here the unused material schedule revealed the fact that swabs had been taken inside the car, but they were not in fact sent off to be tested. There was also the finger print analysis which revealed that a finger print belonging to the Appellant was found inside the car and also that a finger print belonging to someone else was also found in the car. Samples from the vehicle were sent to the Appellant's lawyers on 24 th August, 2016, prior to the hearing before the Assistant Magistrate. They were thus on notice of that work having been done. The second category of unused material was a hand-over note by a police officer listing that CCTV footage should be exempt at various premises along the route that the Renault Clio was believed to have been driven. The other part of this category of documents was some telephone evidence. It is to be remembered that this Court has seen no evidence whatsoever in this respect, and has to go only on what is set out in the contentions as to what the evidence might be. However, we consider those contentions not so that we can weigh their effect as evidence in the hearing, because the evidence was not given, but so that, assuming it is as described, we can assess the effect of non-disclosure on the fairness of the trial. 27. The Crown summary of the unused material which ought to have been disclosed before trial was that the police had made

enquiry of the Appellant's service provider in order to establish whether or not any telephone evidence could link the Appellant to where the driving had taken place. Those enquiries apparently revealed that the Appellant's telephone was in the east of the Island when the driving had taken place - it showed in essence that the Appellant's telephone was making contact with masts in various locations in the St Helier/St Saviour area. The officer in charge of the case considered that this evidence amounted to unused material because it was not specific enough for the prosecution to rely upon. He then took the view that it did not need to be disclosed to the defence because it did not undermine the prosecution case or assist the defence case. He concluded this because the defence case at interview was that he was not the driver and was elsewhere at a property which was not nearby. The Crown contends that it was only at trial that it became obvious for the first time that the defence case was that the Appellant was in St Peter at the time of the dangerous driving. Accordingly it was said that the telephone evidence was prejudicial to the Appellant on his defence and would have strengthened the prosecution case in the circumstances it is contended by the Crown that even though there was a breach of the disclosure guidelines, no prejudice has in fact been caused to the Appellant by the fact that it was not disclosed until after trial. By contrast the Appellant has contended that the fact that his telephone was making contact with masts in St Helier and/or St Saviour suggests that he may have been on the internet at the time of the offence and in that event would be unlikely to have been driving. That contention is not admitted by the Crown who say there might be other reasons why his telephone was making contact with the masts in question. 28. The only authority put before the Court in this respect was the extract from Archbold at paragraph 7 - 91 in respect of the law of England and Wales, which suggested that there were alternative approaches that might be taken to the assessment of any undisclosed material. In the absence of the authorities referred to, the Court invited counsel to submit written contentions with the cases by close of business on Friday 16th December. Further contentions were submitted by the Crown, which the Court has considered. Advocate Steenson also put in further submissions on 30th December. The Court has also considered these. 29. The issue is what conclusion should be drawn from any failure by the prosecution to comply with its duty of disclosure. According to Archbold, at para 7-91, the issue on an appeal against conviction where there has been a failure by the prosecution to comply with their disclosure obligations will be whether, taking all the circumstances of the trial into account, there is a real possibility that the Jury would have arrived at a different verdict had the necessary disclosure been made. This is to be determined by reference to the trial as it was conducted, not by reference to how it might have been conducted if the undisclosed material had been available to the parties from the outset. Authority for that proposition is said to be *Fraser v HM Advocate*

[2011] UK SC 24 . Archbold refers to a Privy Council decision which takes a "novel" approach, namely *Taylor v The Queen*

[2013] UK PC 8 . This was a majority decision on appeal from Jamaica. Archbold notes the Privy Council view that the appellant must be able to show what effect the evidence would have had if use had been made of it at the trial as only then can the Court judge what the response of the prosecution witnesses would have been if proper use had been made of the undisclosed evidence in cross-examination. This is criticised as leading to impermissible speculation. 30. In Taylor , the appellant had been convicted of murder, largely upon the evidence of a man called Grey, who said that he had seen the appellant shoot the deceased twice. Grey then ran away from the scene to the home of his neighbours Mr and Mrs Hartley. He said that he told them what had happened. Grey's cross-examination was limited to the reliability of his identification of the defendant as the person who shot the deceased, because it was very dark. Mr Hartley gave evidence that the deceased's house was about 110 yards away from his own home. On the evening in question he heard two gun shots, which appeared to come from the direction of the deceased's house. Grey came into his yard, knocked on the door and subsequently told him something. Grey did not speak to his wife Mrs Hartley, and he then went to bed. Mr Hartley was asked some questions to test his reliability, but there was no challenge to the substance of his evidence. 31. Mrs Hartley had given a statement to the police a few days after the murder on 15 th September but she did not give evidence at trial. In her witness statement, she said that she saw the deceased at about 7pm at the gate of her house on the night he was killed. He asked for a bag of mangoes that he had left there, took the bag and went to his yard. At about 9.30pm she was at home with her husband, her four children, two grandchildren and a friend of the family, Grey. She heard two explosions sound like gun shots. She also heard a voice saying "Jesus". It seemed to come from the deceased's yard. She told her husband to shut the door. The next day her husband and Grey left the house early in the morning and at about 7am she and three others went to the deceased's yard where they saw him lying on his back and his house open. They raised the alarm. 32. It was clear that counsel for the appellant did in fact have a copy of Mrs Hartley's statement on his case file. He was unable to give any explanation as to why he did not make use of the statement or indeed call her to give evidence. It is clear that what she said in her statement was inconsistent with the evidence of the principal witness Grey, who claimed he had watched the shooting. 33. On appeal, the appellant submitted that her evidence was of such importance that in its absence the trial was unfair. It was said that it was essential to establish who was at fault, and that it was the prosecution who had not disclosed the statement in sufficient time to enable his lawyers to interview her and seek to call her if they wished, then clearly the appeal should be allowed. Lord Hope, giving the majority judgment said this:- "13. Enquiries as to when Mrs Hartley's statement was disclosed to the defence and as to why, assuming that it was available to the defence at the second trial, no use at all was made of it have not produced a satisfactory answer. But, even if it was possible to say either that the prosecution was at fault for delaying its disclosure or that the appellant's counsel was at fault for not having made use of it, this would not be enough to justify a finding that there has been a miscarriage of justice. The focus must be on the impact which those failings had on the trial, and on the verdict that

was pronounced at the end of it, rather than attempting to assess the extent to which either the prosecution or defence counsel were at fault: *Teeluk v State of Trinidad and Tobago*

[2005] UKPC 14 ,

[2005] 1 WLR 2421 , para 39, per Lord Carswell. The Court must have material before it which will enable it to determine whether the conviction is unsafe. So the appellant must be able to show what effect Mrs Hartley's evidence would have had if use had been made of it at the trial. It is not enough to engage in speculation. He must be able to show what she would have said if her statement had been disclosed in time for the case for the defence to be prepared thoroughly. Only then can the court judge what the response of the prosecution witnesses would be likely to have been if proper use had been made of it in cross-examination." 34. Lord Hope then turned to the facts in question. He noted that there was some important gaps in Mrs Hartley's statement, and that there were no unequivocal contradictions of Grey's evidence. Applying the test set out in paragraph 13 to the facts, the ground of appeal was rejected. At paragraph 20, Lord Hope said:- "The Board must ask itself whether Mrs Hartley's evidence, if given at the trial, might reasonably have affected the decision of the jury to convict. The gaps in Mrs Hartley's evidence, which taken at their face value might suggest that Grey was not present at the shooting, must be balanced against the weight that the elements of special knowledge give to Grey's evidence that he was there, taken together with the support which is evidence received from Mr Hartley. The Board finds that the balance lies so far in favour of accepting the veracity of Grey's account that there is no reasonable possibility that the jury would have arrived at a different verdict." Lord Kerr gave a dissenting opinion - he concluded that:- "In my opinion, the proper test to be applied where new evidence which ought to have been put before the jury has subsequently come to light is whether that evidence might reasonably have led to an acquittal. Brought home to the circumstances of this case, the question is 'Might the jury have reasonably declined to convict if they had been made aware of the evidence of Mrs Hartley?'" Lord Kerr goes on at paragraph 53:- "If proper use had been made of Mrs Hartley's statement, the course of the trial would have been markedly different. Instead of suggesting to Grey that he had been mistaken as to his identification of the appellant, a direct challenge could have been made to the credibility of his claim that he was present at the scene of the shooting. That would have been a far more fruitful line of defence. The possibility that the jury would be unconvinced of the truth of his account is, in my view, unquestionable. ...

45. Enquiries as to why Mrs Hartley's statement was not used by the defence during trial proved inconclusive. There can be little doubt, however, that it could have been deployed to potentially considerable effect. It provided a clear basis on which to challenge not only Grey's evidence but that of Mr Hartley. Such information as is available seems to point to error on the part of counsel for his failure to use the statement but one does not need to reach a judgment on that since what is at stake here is the safety of the conviction. That

question must be approached by considering the possible impact that effective use of Mrs Hartley's statement would have had on the course of the trial, without regard to the reasons that this did not happen ..." 35. On that basis, Lord Kerr decided that the verdict was unsafe. 36. Unless I have misunderstood it, the comment by the editors of Archbold is not correct. The Privy Council did not take a novel approach in Taylor , but, by contrast, applied exactly the test which is described in relation to Fraser v HM Advocate . 37. It is interesting to note that in Fraser v HM Advocate , just two years earlier, the Supreme Court included both Lord Hope and Lord Kerr. Lord Hope gave the majority judgment, and Lord Kerr agreed with him. 38. Lord Hope said in Fraser that there was a threshold test which was first to be considered - was the new evidence important evidence of such a kind and quality that it was likely to have been found by a reasonable jury, under proper directions, to have been of material assistance in their consideration of a critical issue that emerged at the trial? If that test is passed, the Court would then go on to consider the consequence test. As Lord Hope put it at paragraph 37:- "That test requires the Court to assess the consequences of the non-disclosure in the light of what actually happened at the trial in order to determine whether what happened at the trial was unfair. The approach which the appeal court took when it was applying the Cameron test was to assess the consequences on the assumption that, had the undisclosed material been available, the trial would have been conducted differently. That, in itself, suggests that the trial that actually happened could be regarded as having been unfair because there was a real possibility that, taking all the circumstances of the trial into account, the jury would have arrived at a different verdict.

38. One cannot, of course, avoid making some assumptions as how the trial might have been conducted if the material had been disclosed to the defence. It will always be a question of degree as to how far it is proper to go in carrying out that exercise. But the purpose of doing this is to assess the extent to which, having regard to the way the case was conducted by the Crown, the material would have weakened the Crown case or strengthened the case for the defence. It is on the cases as presented at the trial that the court must concentrate, rather than the case as it might have been presented. It is not for us to speculate as to what the case might have been, much less how the jury would have reacted to it. What the Crown asks us to do, and what it persuaded the appeal court to do, was to consider the case on the basis that the discovery of the rings on 7th May was indicative of the appellant's guilt were completely different reasons from those advanced at the trial. In effect we were being asked to deal with the case as if we were a new jury trying the case for the first time. This is not permissible. Our task is quite different but entirely clear. As the appeal court said in *McCreight v HM Advocate*

[2009] SCCR 743 , para 95, it is not the Court's task to decide what the outcome of the trial would have been if the trial had been conducted on an entirely different basis. We must ask ourselves whether, in the light of the undisclosed evidence, there is a real possibility that the jury at this trial would have arrived at a different verdict." 39. It seems to us that these extracts show that the Fraser test is not substantially different from the Taylor test, which is unsurprising because the decisions were given by the same judge (Lord Hope) within a

couple of years of each other. We note that in the recent case of R -v- Garland

[2016] EWCA Crim 1473, the Fraser test was applied. 40. In our judgment it is clear that the unused material needs to be assessed against the trial as it was conducted. That is so both on the authorities and as a matter of principle. As we have indicated, we think there is no material difference between the Fraser test and the Taylor test - but if we are wrong on that, we think the Fraser test is to be preferred. The Court should assess the effect of the undisclosed material on the trial as it was actually conducted. The disclosure rules are as they are to ensure that a defendant is not taken by surprise at his trial and that all the evidence which might go to damage the Crown case or support his own is made available to him. His defence - his own case - should not be undermined by withholding from him material which is in the prosecution's possession. But that is a far cry from a rule whose purpose is not to seek out the truth but to maximise the defendant's chances of securing an acquittal. Fairness demands that the defence should have an opportunity to view the unused material and use it if thought fit, but fairness does not demand that where the prosecution have fallen down on its duty of disclosure, the Court should attempt to identify every possible defence which the defendant might have hit upon and assess its chances of success, nor does fairness demand that the Court permit a defendant to run his defence on one basis and then, finding some defect in disclosure, change horses and try out some other defence based on the new material. We have therefore considered the unused material, which should have been disclosed, against the defence which was actually run at trial. 41. In the circumstances, we have an apparent dispute between the Crown and the Appellant as to whether the material would in fact have shown that the Appellant's telephone was being used to connect with the internet at the time of the dangerous driving, coupled with the fact that at that time, when the Appellant said that he was in St Peter, his telephone appears to have been making contact with masts in St Helier and/or St Saviour. 42. As Crown Advocate Morley-Kirk rightly conceded, the police officer making the decision on unused material made a mistake in not disclosing this evidence of telephone activity to the defence, and in any event the prosecution ought to have disclosed the schedule of unused material to the defence. Nothing we say hereafter detracts from the fact that this was a serious breach of the disclosure guidelines by the police and prosecution and it is not to be condoned. The prosecution have all the investigation material in their possession, and of course in carrying out the investigation the police should follow reasonable and proportionate lines of enquiry so as to establish whether there is sufficient evidence that any particular person did or did not commit the offence under investigation. Here both counsel below and the police failed in their respective duties. 43. For us, the question is what the effect of that failure is. In our judgment, it is not a correct approach to speculate as to what the Appellant might or might not have done had he been aware of all the unused material: he is not to be given the opportunity, by such judicial speculation, of advancing a defence which he did not in fact advance. Here, without the unused material, he did advance a particular defence. It was that he was in St Peter at the time of the dangerous driving, and it follows that the unused material should

be considered in the context of whether or not it might conceivably have assisted that defence. It was not his defence that he was on the internet at the time or that he was a passenger. It was his defence that he was in St Peter. The unused telephone material clearly does not assist him in that respect and accordingly the wrongful failure to disclose had no effect on the fairness of the trial. 44. Similar things can be said about the fingerprint evidence. In his submissions, Advocate Steenson suggested that he did not know what he could not know, and therefore the unused material of fingerprint evidence caused great damage. In his written contentions, he suggested that there was evidence of at least one other fingerprint on the door of the car in question which could have been checked against the police database, but which was not. On the other hand, the Crown submission was that the fingerprint analysis took one nowhere. There was a fingerprint belonging to the Appellant found inside the car, unsurprisingly because on his own admission he had been in it earlier on the Saturday evening. There was a fingerprint belonging to someone else found in the car, unsurprisingly because it was not the Appellant's car. In our view, whilst it would have been open to the defence to ask the police to conduct a full fingerprint check against database records, it is disproportionate to suggest that the police were required to conduct such a check when the Appellant was in possession of the vehicle in question both before and after the dangerous driving and obviously awake shortly after the dangerous driving took place, because he spoke over the telephone with police headquarters. 45. Finally in so far as CCTV is concerned, our understanding from the Crown contentions is that the unused material did not assist the Appellant. In any event, however, it would have been open to the Appellant to identify those places where he walked, according to his evidence, in the early hours of Sunday 28th February and to ask that the CCTV checks should be made against relevant cameras to establish his whereabouts. He was not of course obliged to do that because he had to prove nothing. On the other hand, the information available to him as to where he was at the relevant time could not have been available to the police and it would not have been proportionate to expect the police to review every single piece of CCTV footage of the events in St Helier that evening on the off-chance that the Appellant might be found at a particular place at a particular time. 46. While therefore we deprecate the non-disclosure, we cannot say that it has affected in any way the fairness of the trial and the Appellant's complaints in this respect also fail. Accordingly the appeal against conviction is dismissed. Authorities Road Traffic (Jersey) Law 1956. Archbold Criminal Pleading, Evidence and Practice. R v Hart [1932] Cr App 202. Wilkinson v DPP

[2003] EWHC 865 (Admin) . Offences Against the Person Act 1861. McGuinness (Paul) v HM Advocate

[2010] HRLR 17 Sc. Fraser v HM Advocate

[2011] UK SC 24 . Taylor v The Queen

[2013] UK PC 8 . R -v- Garland [2016] EWCA Crim 1473. Page Last Updated: 11 Jan 2017 BAILII:
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