

JERSEY / JUDGMENT

Monks -v- AG [2018] JRC 115 (02 July 2018)

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JUDGMENT

THE BAILIFF:

Introduction

1. On Tuesday th August, 2017, the Appellant was convicted before the Magistrate's Court on one count of grave and criminal assault. She appealed against that decision on the grounds that there were serious procedural defects before, during and after trial; on the grounds that there were errors of law committed by both the prosecution and the Magistrate; that there was insufficient evidence upon which the Magistrate could come to his decision; and/or that the Magistrate drew wrong conclusions and inferences from the evidence so rendering the conviction inherently unjust, unreasonable and unfair. 2. The appeal was heard and allowed with reasons reserved on 13 th March 2018. This judgment contains those reasons. The prosecution case below 3. The complainant, Mr Gary Nicholson, is a building contractor and the current owner of a building business in which he has worked for some 35 - 40 years, initially with his father and more recently as owner. In or about 2014, he was contracted to undertake renovation and extension work at a property in St Clement, owned by the Appellant. His contract had commenced on 24 th November, 2014, and was supposed to be completed by 26 th July, 2015, but by September 2016 the work had still not finished. The Appellant considered that Mr Nicholson was in breach of contract and, perhaps understandably the relationship between Mr Nicholson and the Appellant had become so strained that the Appellant no longer wished to be at the property if Mr Nicholson was present. On 14 th September, 2016, the complainant attended the property at about 12:15pm. He asserted that a number of his staff or contractors were on site, as was the architect and also the Appellant's husband. The Court heard other evidence that he and the Appellant were at the material time separated. According to the complainant the Appellant called to him saying that she wanted to speak to him and he went into the property. She was very angry and he said that she picked up a cloth bag containing a set of taps which she waved at him, although no contact was made. She was shouting and screaming at him and telling him to instruct his staff to remove some skirting boards upstairs at the property. The complainant would not do so until he had spoken to the Appellant's architect. He turned to leave the property, and as he did so, he asserted that the Defendant picked up a tile demonstrator and struck him on the back of the neck or the shoulder with the frame. He

said that the Defendant followed him punching him in his back and shouting that " If you walk away from here I'm going to kill you. I going to fucking shoot you ". The Appellant is said to have run past him to his van, screaming again that if he left the job she would shoot him and kill him. He said that at the van the Appellant picked up a piece of stone and told him she was going to smash the van. As she was about to open the door he told her that if she did his dogs might bite her. She is alleged to have replied " I'll kill them as well ".

Although the Appellant's husband was trying to calm her down, she threw the piece of stone at the complainant and it hit him on the right shoulder as he was walking down the slope to leave the property. He said that he was very nervous and had never been in a situation like that and that he suffered stiffness in his neck and arms for the next two weeks. 4. The Relief Magistrate heard evidence not just from the complainant but also from Mr Planner, a carpenter employed by the complainant and working on site; from Mr Dunn the site foreman, from Mr Bree a self-employed electrician who was putting in a fibre optic cable for Jersey Telecom; from Mr Adeler an immediate neighbour of the Appellant together with members of the neighbour's family; and from two police officers. The Relief Magistrate also heard evidence from the Appellant, her husband, her architect and Mr Robin Troy. The purpose of the latter's evidence was to inform the Court about various difficulties between the neighbour and the Appellant and the negotiation of party clauses to the contract of purchase, referred to in other parts of the evidence. There was also a set of formal admissions agreed prior to and during the course of the trial. The Relief Magistrate's decision 5. Having heard evidence over five days between 20 th

- 26 th July, and listened to closing speeches on 27 th July, the Magistrate then reserved his decision and gave judgment on 8 th August. At that time he declared that he was satisfied beyond reasonable doubt that the Appellant was guilty of the charge of grave and criminal assault and he ordered a social enquiry report. Sentencing took place on 5 th September, when the Magistrate indicated his belief that on the day in question the Appellant was extremely angry and frustrated by the lack of progress regarding the building project, and he accepted that she might well have had good cause to be so frustrated. He said that he believed that she lost control and that from previously shouting and gesticulating at the complainant, her anger got the better of her and escalated into the grave and criminal assault. The Relief Magistrate noted that the complainant did not suffer more than minor physical injury, and he placed the Appellant on probation for a period of twelve months, but because of the seriousness of the offence also imposed a sentence of 120 hours community service. He did not make a restraining order but he awarded the prosecution its full costs. 6. The Relief Magistrate's full reasons for his decision were handed down the day before the sentencing hearing. His judgment sets out in detail the evidence which he heard. He noted the burden of proof rested with the prosecution and that the standard of proof was one of beyond reasonable doubt. Having reviewed the evidence, he then noted that the defence relied heavily on discrepancies between what the eye witnesses said in their statements and what they said whilst giving evidence. He also noted that the defence relied upon the different accounts given of the positioning of the various witnesses when they stated what

they had witnessed and the clarity of the view they had, if indeed they had any view at all. 7. The Relief Magistrate indicated that he found the complainant and indeed all the prosecution witnesses to be truthful. He noted that the Appellant's case was that no assault had taken place and that the prosecution witnesses had conspired to fabricate a case against her. He thought such a case was quite illogical because: (i) The complainant would not advance the civil dispute he had with the Appellant in any sense by making an allegation of assault against her. (ii) The suggestion that the neighbours had formed part of a devious conspiracy to have the Appellant arrested for a crime she did not commit made no sense. There was no reason why the complainant would become involved in such a conspiracy, and the same applied to visitors to the neighbour's property; equally the witnesses would have had to come together to concoct the evidence in a very short time and again this was most unlikely. The Relief Magistrate did not think that if the neighbour conspired with the complainant it would in any way assist the neighbour's case of wishing to purchase the Appellant's property. 8. The Relief Magistrate then noted that Mr Monks was not prepared to give a statement to the police at the time of the investigation as he saw no reason to make one. The Relief Magistrate considered that he came to court out of loyalty to his wife, but even so he had to agree that he held on to her and that the complainant was saying " Don't hit me ". The only logical explanation for the evidence given that the complainant was saying " Don't hit me " was that the Appellant was actually hitting him. 9. The Relief Magistrate noted the final submission of Advocate Martin that the prosecution had failed to put the evidence of the majority of the prosecution witnesses to the defendant in cross-examination and therefore her submission was that he should disregard that evidence. He rejected that submission, and considered that the witnesses were available for cross-examination and challenge by the defence and they were so cross-examined. It was open to the Appellant when she gave evidence on her own behalf to deal with any disputed evidence when giving her testimony. 10. Finally the Relief Magistrate noted the complaint that the police did not take a statement from Mr Ainscough the plumber at the time, and indeed did not attempt to do so until 22 nd May 2017. Although it was good practice to have taken such a statement, the Relief Magistrate noted that there was no property in a witness and the defence could have approached him to take a statement themselves. The Relief Magistrate took the same approach to the evidence of Mr Bree who in a rather unsatisfactory first interview was not asked by the police for his recollections as to the accuracy of what the Appellant said in her question and answer interview. As with the plumber, it was in the Relief Magistrate's view open to the Appellant to take a witness statement directly from Mr Bree and the defence chose not to do so. The legal test on appeal 11. This appeal lies under Article 17 of the Magistrate's Court (Miscellaneous Provisions) (Jersey) Law 1949 , and by Article 20(3) of the same law, the Royal Court may on appeal " by order confirm, reverse or vary the decision of the Magistrate's Court, or may remit the matter with its opinion thereon to the Magistrate's Court, or may make such other order in the matter as it thinks just ... ". There was no dispute between the Appellant and the Respondent on this appeal that the test on appeal was correctly set out between paragraphs 15 and 21 of the decision in this Court in the case of *Graham v Attorney General*

[2013] (1) JLR 91. In summary, the Royal Court does not lightly interfere with a decision on the facts where the transcripts reveal that there was evidence on which the Magistrate could properly have come to the conclusion which he or she did. Nonetheless, if there were a lurking doubt or sense of unease at the outcome, the Royal Court retained power to allow the appeal and make an order appropriately as a result. The evidence 12. Having reviewed the evidence which was given, the Court was satisfied that there was no credible evidence on which one could say that a grave and criminal assault had been committed. We recognise that the Relief Magistrate was in a better place to assess the credibility of the witnesses but even so, there appears to us to have been such discrepancies in the prosecution case that it would be impossible to conclude that the burden of proof had been discharged in relation to the allegations made. The Relief Magistrate himself recognised that there were a number of discrepancies in the evidence but we think probably the conduct of the defence case which criticised everything and everybody, including the making of a number of implausible assertions about prosecution witnesses was such that understandably the Relief Magistrate allowed himself to become confused. In saying that, we do not condone some of the procedural errors which occurred below and we will return to those shortly. We merely mention the scattergun nature of the defence as being the likely explanation for the Relief Magistrate missing the significance of the deficiencies in the evidence. 13. The charge was one of grave and criminal assault, in circumstances where the complainant suffered little injury. Indeed witnesses attested to the fact that there was no visible evidence of injury at the time nor indeed was there any such evidence five days later. In *AG v Vaughan* (unreported Royal Court November 1974) Ereat DB summed up to the jury in this way:- "I am going to begin by telling you the meaning of a 'grave and criminal assault'. Now in Jersey law, and assault is a touching or laying hold by one person on another in an angry, revengeful, rude, insolent or hostile manner, and it includes an attempt to do so provided that the person who is threatened is led to anticipate an attack. In the United Kingdom an attempt to do those things is called 'an assault' and the actual doing of those things is called 'a battery'; but here we make no such distinction, we use the same name both for an attempt and for the actual doing of the thing; they are both equally called 'assaults'. In Jersey law assaults can be of two kinds. They can be either a common assault, which is the less serious of the two kinds of assault, or they can be a grave and criminal assault, which is, as its name implies, the more serious type of assault, and the only difference between them is one of degree." 14. This definition of the meaning of a grave and criminal assault was mentioned without criticism by the Court of Appeal in *De la Haye v Attorney General*

[2010] JLR 218 at paragraphs 16 - 17, although at paragraphs 23 - 30, the Court of Appeal expanded upon the direction to the jury in connection with the mens rea of recklessness. 15. What, then, was the prosecution case of a grave and criminal assault based upon? It was accepted by Crown Advocate Baglin that the Relief Magistrate could not have convicted the Appellant of grave and criminal assault unless he were sure that she had either struck the complainant with the demonstrator tiles or with the stone she picked up outside or had

committed both assaults. Her loss of temper and the threats which the Appellant made would not of themselves have been sufficient in the circumstances of this case to amount to a grave and criminal assault without the use of the weapons in question. We turn therefore to the evidence in relation to either of those alleged assaults and deal first with the demonstrator tiles. In his evidence in chief the complainant described how he had had a contretemps with the Appellant as he had not agreed to instruct his men to remove the skirting boards upstairs until he had had an instruction from the Appellant's architect. He turned round to leave the Appellant in the house and he went outside the front door to light a cigarette and " the next minute I had a hell of a bang on the back of my neck and that was the slab of tiles, the sample tiles that's in about something like that ". These tiles were approximately three-quarters of an inch thick and the sample tile was about two foot by twelve inches. The complainant was quite clear that the Appellant did not throw the sample tile at him but instead she hit him with it and then she put it down. He did not see her hit him with it, because he was facing away from her when she hit him. He said that after she had hit him with it, she put the sample tile down on the boiler box. He responded to this by walking down the steps to go towards his van and she followed him, punching him in the back. The complainant said that when this incident took place, Martin Planner was inside the area and also Joseph Dunn his foreman, Bobby Ainscough, a plumber and Andy Bree, the electrician. He confirmed that Mr Monks was also present. 16. We saw in the Royal Court, as indeed did the Relief Magistrate in the proceedings before him the demonstrator tile which was allegedly used to commit this assault. It was described as being approximately two feet by twelve inches, which we think is accurate, and is surrounded by a metal frame. The edge is sharp, as indeed the complainant agreed, and he was wearing just a shirt at the time. In our judgment, it would be quite surprising if the Appellant, who is of average height and build, had been able to raise the demonstrator tile above her head and bring it down on the back of the complainant's neck, but even assuming that she were able to do so, it is in our view impossible that such an action could have caused no visible injury either at the time or five days later. The demonstrator tile is heavy and members of this Court felt it for themselves. We do not think the assault could possibly have taken place as the complainant described. 17. We have naturally reviewed also the other evidence. Mr Martin Planner said in chief that he was standing at the other end of the hallway and he gave evidence that the Appellant had some sample tiles in her hand, and when they all moved outside in the argument, she " hit Gary on the back of the neck with these tiles, sample tiles ". He was about four metres away and said the sample tiles were on a board, a thick sort of tile. As far as dimensions were concerned, he thought about eight or ten inches. He said he saw the Appellant raise the demonstrator tiles using both hands. In his evidence in chief, Mr Planner said that he had an unobstructed view. However he agreed that when he had made his statement to the police, he was in the hallway some five metres away, and his view was partially blocked by the foreman Joe Dunn, a plumber Bobby Ainscough and the Appellant's partner Mr Monks. It is not obvious to us that with three people between him and the Appellant that he would have had a clear view at all, and indeed the clarity of his description does not make it reliable in

those circumstances. 18. Mr Dunn, who was closer to the incident than Mr Planner, described how the Appellant and the complainant had been arguing, and how the Appellant picked up a tap. He thought that she was going to hit the complainant with it and raised it above her head. However she did not hit him with it, but punched him a couple of times. This apparently took place just inside the front door. Mr Dunn was approximately four feet away from the Appellant and had a clear and unobstructed view. He thought the electrician Mr Bree and the plumber Bobby Ainscough were also present and he confirmed that Mr Monks was also present and witnessed what took place. Mr Dunn went on to say that after this incident, the Appellant picked up a couple of border tiles. He thought that she went to hit the complainant with them, but she did not do so. He did not see her hit him. According to Mr Dunn the complainant did not have his back to the Appellant at this time because his reaction was to put his hands up to protect himself. It follows that he must have been looking at her if Mr Dunn's recollection is accurate. According to Mr Dunn this all took place inside the house between the front door and the stairs. Although Mr Dunn did not see the Appellant strike the complainant with the tiles, he did see her deliver two punches to the complainant's head. There are two difficulties about that evidence. The first is that neither the complainant nor Mr Planner asserted that there were any punches delivered inside the house. The second is that it would be impossible to use two hands to pick up the demonstrator tiles - and it would need two hands to do so if she were attempting to hit the complainant with them as he thought she was - and punch the complainant at the same time. 19. Mr Bree was working at the property on the date of the incident, putting in a fibre optic cable for Jersey Telecom. He heard an argument between the Appellant and the complainant but as he was working in what he described as "a kind of cellar" he did not see anything take place inside the property. 20. When the Appellant gave her evidence, she described how she was trying to match tiles which she had brought over from France with the border tiles she had obtained from Pastella. She agreed that when she saw the complainant on that particular day, she was extremely annoyed and frustrated. She also said the complainant was angry. In the course of the argument, the Appellant said she told the complainant to go away, he was lying and she could not take this any more. According to the Appellant, at the relevant time, her husband and Bobby Ainscough were in the hallway, and Andy Bree was at that point outside. Mr Planner she said was upstairs. She agreed she was holding the border tiles which she picked up with both hands, holding them from underneath. As the complainant would not leave, she put the tiles back down again, then returned to the complainant and told him to get off her property. She denied attempting to or hitting the complainant at any time. 21. Mr Stanton Monks gave evidence. He described how the Appellant had had a conversation with the complainant regarding the taps, which she was holding and which the plumber had said were useless because parts had been lost. He agreed that the Appellant was annoyed and her voice was raised. She asked the complainant to go away, and eventually he did appear to be leaving. At that point the Appellant picked up the ceramic display tiles, as he described them, in a metal frame, because he and the Appellant were on their way out, going to Pastella. Mr Monks said that

the tiles were in her right hand although she had initially picked them up using both hands. He knew she was annoyed and he stayed close to her, holding her left hand. He agreed that the complainant said as he left the property " don't hit me " twice. As Mr Monks put it, " the funny thing I was going to say is we were not particularly close to him at the time and, of course, he hadn't been hit ". In cross-examination, Mr Monks agreed that the Appellant had lost her temper but he was resolute that although the complainant had said twice " Don't hit me ", in fact the Appellant had never hit him. 22. Apart from the complainant and Mr Planner, no two witnesses described what took place in precisely the same way, and as far as Mr Planner is concerned there seems to be agreement that he did not have an unobstructed view of what took place in any event, with two or three people in the hallway between him and the Appellant. Furthermore, the complainant's evidence was not consistent with the statement he first made to the police, and Mr Dunn, who was best placed to give evidence about what had happened, described the Appellant as punching the complainant, which means it would have been quite impossible for her to have used both hands to raise the demonstrator tiles above her head and bring it down on the complainant's neck. Above all else however, we return to the fact that members of the Court have picked up the demonstrator tile in question; and while it is not impossible to contemplate that it could have been used as a weapon, we reiterate that if brought down by an angry person on the back of the neck of another, it is inconceivable that there was no injury caused to the victim. Accordingly, we are satisfied that the learned Relief Magistrate could not reasonably have been sure that the Crown had proved that the assault on the complainant with the demonstrator tiles took place as alleged or at all. 23. We now turn to the second alleged assault. According to the complainant he was walking down towards his van when, towards the bottom of the slope, the Appellant ran past him and told him that he was not to get into that van. He said that the Appellant picked up a rock and she was going to use it to smash the windscreen and he told her not to do so. The rock was granite and was approximately ten inches round. He identified the rock in question before the Relief Magistrate, and it was also produced to us. We noted it was heavy. According to the complainant, the Appellant threw it at him, and it hit him on his right shoulder. He walked past her and got to the entrance, and the neighbours took him into their house. Mr Planner did not see the incident as he was inside; neither did Mr Dunn. Mr Bree saw the Appellant's open hand going towards the complainant's head outside by his van. He was not sure whether she made contact with the complainant's head or not, because he did not see the complainant's head move. He had a clear and unobstructed view of the Appellant's hand. Despite him having a clear view of the Appellant in that way, he certainly had not seen her pick up a rock and throw it at the complainant. We have read the evidence of the neighbours which we did not find particularly helpful on the narrow point as to whether or not a granite rock had been thrown at the complainant, although their evidence was to the effect that the Appellant was out of control. One witness said that he had never seen anybody so angry as that before. 24. When she gave her evidence, the Appellant said that she did not at any point lift the granite rock, nor did she hit the complainant with it. She did not assault him. Mr Monks was with the Appellant by the

complainant's van, and he did not see anything take place. Indeed, by the van his recollection was that the complainant was on the telephone. He agreed that the Appellant was extremely cross. 25. It will be seen immediately that the evidence of the alleged assault using the granite rock rests heavily on that of the complainant. The Appellant denied the alleged assault, and the evidence given by the Appellant's partner Mr Monks was inconsistent with any assault having taken place, although neither counsel really dealt with his testimony entirely appropriately in the sense that neither got to the point of asking him whether he saw the Appellant pick up a granite rock and throw it at the complainant. 26. Once again there are discrepancies in the account given by the complainant, and, once again, having picked up the granite rock with which the Appellant is alleged to have assaulted the complainant, the members of the Court find the complainant's account to be most unlikely. We note that he suffered no injury, which again would be a surprising outcome if a rock of that weight and type had been thrown at him. The rock we saw was rough-hewn and heavy. It would have left a substantial mark, and yet no one saw any marks on the complainant either at the time or five days later. 27. For all these reasons, this Court considers there was no credible evidence on which to convict the Appellant on a charge of grave and criminal assault. Other points 28. Advocate Martin raised a number of other points in presenting her client's appeal. In the light of the decision we have reached on the substance of the matter, it is not necessary to deal with them, but we will in deference to her arguments, address them briefly. 29. The first procedural point taken by Advocate Martin was that the charge of grave and criminal assault was substituted for the original charge of common assault at a directions hearing at which the Appellant was not present. This process was improper, and breached the Loi (1864) réglant la Procédure Criminelle, which requires that a defendant be present at all the court hearings concerning his case. This rule is well understood to be subject to the discretion in the court to proceed in the absence of the defendant if he or she is guilty of misconduct in the face of the court, or there are other special circumstances, but the general principle nonetheless remains, and in our judgment it was wrong for the new charge to be substituted in the absence of the Appellant. However, Advocate Martin conceded that she could not point to any particular difficulty which this caused. 30. Objection was also taken to the form of the charge, which merely contained the allegation that the Appellant had committed a grave and criminal assault on the complainant without giving any particulars. Thus it was said that the Appellant did not know what case she had to meet, and Advocate Martin relied in this respect on *Miller v Attorney General*

[2016] (1) JLR Note 3. 31. Advocate Martin submitted that a detailed case statement was necessary, because in the present case the prosecution evidence was so disparate and because there could in theory have been three different charges brought - the use of the demonstrator tiles, the throwing of the stone, and the apparent delivery of a number of punches. In addition, the court was told of the threats to kill, albeit that does not appear to have been part of the prosecution case in opening although it did appear in the closing speech. 32. It has never been the practice in the Magistrate's Court to have particulars of a

charge provided in the way that Advocate Martin contends should have occurred. In nearly every case, it is unnecessary for those particulars to be given. The nature of a criminal prosecution in the Magistrate's Court is that it is a summary process, and there is thus not the same degree of formality which is to be found in process in the Royal Court. In most cases this causes no difficulty because the witness statements make it plain what the particulars of the alleged offence really are. 33. Occasionally there will be cases such as the present where it might have been helpful if the prosecution had been required to nail its colours to the mast. We note that the defence had attempted unsuccessfully before trial to obtain clarification from the Crown about the nature of the prosecution case. Nonetheless, it would have been open, in our judgment, to the defence to request an order from the Magistrate that such particulars be given, but this course was not followed. In the circumstances which applied here however we would not have regarded this as a critical question which would lead us to set aside the conviction. 34. Next it was said that the prosecution introduced the question of recklessness in the opening speech. It appears to us that recklessness was unlikely in the extreme to be relevant to the present case, and accordingly we do not think that the defence suffered any prejudice from a reference which was never likely to have troubled the Relief Magistrate. 35. Advocate Martin further submitted that the question of a threat against the complainant by the Appellant using the taps which she had picked up at the premises also was introduced as part of the assault at half time when there was a submission of no case to answer. The underlying objection from Advocate Martin was that as the Crown had not relied on the use of the taps or indeed on the alleged threats to kill during the opening speech, claiming those to be an essential part of the Crown case, there was no need for her to cross-examine the witnesses on those parts of the evidence. Had the defence pressed for further particulars of the charge at the outset, of course this conundrum would not have arisen but it appears to us that if the defence had been contemplating a submission of no case then the sensible course would have been to cross-examine on evidence which could support a case even if it had not been relied upon by the Crown in opening. The Crown's opening speech is not a pleading from which it cannot depart. It is an introduction to the Crown case, and if the evidence comes out differently, a court is entitled to have regard to it. Of course, in these circumstances one would expect the defence to rely on the inconsistency between the Crown opening and the evidence given to contend that the evidence had no sufficient credibility, but it cannot be said that the Court or jury cannot proceed on the evidence given. 36. Next it was said that the Crown did not cross-examine the defence witnesses adequately. Advocate Martin agreed that the essence of the Crown case was put to the Appellant, but what was not put to her was the detail of what all the Crown witnesses had said. Thus it was said that the Appellant was not given the opportunity to deny, for example, the two fisted assault said to have taken place to the back of the neck. Advocate Martin submitted that a number of key points were not put to the Appellant: (i) That she had punched the complainant four times in the head in the house, two punches while she held the taps and two punches while she held the demonstrator tiles. (ii) That she threatened to kill the complainant as they walked down the external staircase. (iii) That

she punched the complainant eight to ten times as they walked down the external staircase. (iv) That she hit the complainant with a two fisted blow on his back at his van. (v) That she picked up a stone by the van and hit him on his back whilst there. (vi) That she punched the complainant in the chest at his van. (vii) That she imitated shooting him with a gun when standing at the boundary between her property and that of her neighbour. (viii) That she said " kiss my black nigger ass " to the complainant as she walked away. 37. A number of authorities were put to us in support of this line of argument. In *R v Hart*

(1932) 23 Cr App R202, the judge on appeal noted that:- "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.....". 38. In *Browne v Dunn*

(1893) 6R 67, Lord Herschell, LC, said at page 5:- "Now my Lords I cannot help saying that it seems to me to be absolutely central to the proper conduct of a cause, where it is intended to suggest that a witness is not speaking the truth on a particular point, to direct his attention to the fact by some questions put in cross-examination showing that that imputation is intended to be made, and not take his evidence and pass it by as a matter altogether unchallenged, and then, when it is impossible for him to explain, as perhaps he might have been able to do if such questions had been put to him, the circumstances which it is suggested indicate that the story he tells ought not to be believed, to argue that he is a witness unworthy of credit. My Lords, I have always understood that if you intend to impeach a witness you are bound, whilst he is in the box, to give him an opportunity of making any explanation which is open to him; and, as it seems to me, that is not only a rule of professional practice in the conduct of a case, but is essential to fair play and fair dealing with witnesses." 39. It is absolutely the case that it is the obligation of counsel to put his client's case to the opponent's witnesses; and if he does not challenge the opponent's witnesses, he is not in a position to suggest to the court or jury on closing that those witnesses are not to be believed. 40. In this case, as Advocate Martin agreed, the substance of the prosecution case was put to the Appellant, although all the detail of the different statements of prosecution witnesses were not put to her. Advocate Martin's objection is really linked to the lack of particulars in relation to the prosecution case, but the fact remains that it caused no prejudice to the Appellant because the charge of grave and criminal assault could only have been placed upon the use of the two weapons. Furthermore, it is not the case that the Appellant did not have the opportunity of dealing with the serious allegations against her in her evidence

- the defence has to prove nothing, but nonetheless, when a defendant goes into the witness box denying a charge which has been brought against her, she does have the opportunity of meeting the prosecution case in her evidence in chief. It seems to us that these complaints of Advocate Martin in relation to the cross-examination of the Appellant may have some technical merit as criticism of the prosecution counsel's performance below, but nonetheless they would not have been sufficient to persuade us to interfere with the Relief Magistrate's decision had there otherwise been sufficient evidence to convict. 41. We had more sympathy with Advocate Martin's submission that there was inadequate cross-examination of Mr Stanton Monks, the Appellant's husband, and also a defence witness. Indeed the curiosity about his evidence, which was relevant in the sense that he said that no offence took place and that the Appellant never hit the complainant at all, was that it was neither substantially challenged nor really referred to again other than by Advocate Martin in closing. In his review of the evidence, the Relief Magistrate concluded that Mr Monks came to court out of loyalty to his wife but a review of his evidence shows it to be consistent with other key parts of the evidence and we see no reason to think that he would have been disbelieved - and he was not challenged. We think this was unfortunate, although whether it would have been enough, without the gaps in the evidence, is a different matter. 42. Advocate Martin submitted that there was some procedural default arising from the fact that the Relief Magistrate did not give an immediate decision but instead delivered his decision twelve days later; and also that the reasoned decision was only delivered after the notice of appeal had been entered. It is not entirely clear what the latter criticism amounted, but if it was an implied suggestion that the learned Relief Magistrate would have so tailored his reasons as to defeat what is stated in the grounds of appeal, we think that would have been improper without solid grounds to make that assertion. We note only that Advocate Martin did not make that submission, but at the same time she did not justify why the complaint was made; so we do not understand the point being made. In our judgment, there is nothing improper in a Magistrate taking time to review his or her notes of the evidence and making a decision in a case which had gone on for several days, as this one had, whether a notice of appeal had been entered or not. 43. Advocate Martin also submits that there were problems with the police investigation - that the officers attending on site were unprofessional and biased, that the question and answer interview was not video recorded, that a witness statement was taken from Mr Bree inadequately and that on the second question and answer interview with the Appellant, the investigating officer had not either prepared properly by listening to the first question and answer interview or indeed conducted the second interview properly. It was furthermore said that the police did not take statements from crucial eye witnesses, and that there had not been timely disclosure of some of the evidence to the defence. The police, it was said, had also not properly taken a statement from Mr Monks because the officer merely recorded that he did not wish to provide any sort of statement whereas in fact this was not a refusal at all, but Mr Monks making the statement that nothing significant had happened, and therefore he had nothing to say. It ultimately came out that unfortunately he had not been told that serious allegations were made against the Appellant, and had that been said to him, he would clearly have made a

statement to the police as he did ultimately in court. 44. In our judgment, the police investigation did indeed leave much to be desired. At the same time, there is no property in a witness, and there was nothing preventing the defence from approaching the relevant witnesses and seeking to take a witness statement themselves. It is not at all uncommon that defects in a police investigation are then exploited at the time of trial, and of course it was open to the defence to do that in this case. We are not able to say what the impact of that would have been in this case on appeal, because we have already concluded on the evidence that the Relief Magistrate could not reasonably have found the case proved, and the issue therefore does not arise. 45. Advocate Martin submits that it was impossible for the defence to take a witness statement from Mr Bree because there was a term of the Appellant's bail that she was to have no direct or indirect contact with prosecution witnesses. That submission is misconceived. Contact with a prosecution witness by the Appellant's lawyer does not amount to indirect contact by the Appellant. The lawyer for the Appellant is an officer of the court and one assumes until the contrary is proved that such an officer would not act improperly in taking a witness statement. Generally 46. There were some serious flaws in the prosecution case on the evidence which was provided, both because it was internally inconsistent and because many of the witnesses gave evidence which was inconsistent with their earlier statements. This was a case where, properly conducted by both the prosecuting and defence counsel, the evidence could have been heard much more quickly than it actually was, and the Court below not distracted from hearing irrelevant evidence. The inconsistencies which existed also should have meant that the Court was not faced with submissions about conspiracies between neighbours and the police, conspiracies between neighbours and the complainant, and allegations of lying and bad faith all round. The prosecution counsel below - not counsel who appeared before us - also contributed to the difficulties which the Court below faced by not having a sufficient focus on the facts which needed to be proved. All in all, we consider that the conduct of the case below did not assist the learned Relief Magistrate in reaching a conclusion on the evidence put before him, and in particular, given the way in which the defence was run and the intrinsic lack of plausibility in the defence allegations (of what would amount to a criminal conspiracy between a builder who was late in completing his contract and a neighbour who allegedly wanted to buy this Appellant's property to have her convicted of a criminal offence), it is perhaps unsurprising that he reached the conclusion which he did, overlooking therefore some of the key features of the case, as we have found. 47. For these reasons, we allowed the appeal, quashed the conviction and set aside the order for costs. Authorities Magistrate's Court (Miscellaneous Provisions) (Jersey) Law 1949. *Graham v Attorney General*

[2013] (1) JLR 91. *AG v Vaughan* unreported Royal Court November 1974. *De la Haye v Attorney General*

[2010] JLR 218 . *Loi (1864) réglant la Procédure Criminelle*. *Miller v Attorney General*

[2016] (1) JLR Note 3. R v Hart (1932) 23 Cr App R202. Browne v Dunn (1893) 6R 67 Page Last
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