

ROYAL COURT
(Samedi Division)

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20th March, 1995

Before: The Bailiff, and
Jurats Myles and Herbert

POLICE COURT APPEAL
(The Magistrate)

Carlos de sa Caires

- v -

The Attorney General

Appeal against conviction in the Magistrates' Court on 12th October, 1994, following a not guilty plea to:

1 count of larceny.

Appeal allowed; conviction quashed.

Advocate S.A. Meiklejohn for the Appellant.
Advocate A.D. Robinson, on behalf of the
Attorney General.

JUDGMENT

5 THE BAILIFF: This appellant was convicted before the Police Court on 12th October, 1994, of the larceny of two motorcycle wing mirrors valued at £80 and was sentenced to a fine of £150. He now appeals against that conviction on the ground that the conviction was wrong in all the circumstances of the case.

10 Mr. Meiklejohn, for the appellant, advances his submissions on two limbs. First, he argues that the Magistrate had made up his mind before the conclusion of the evidence that the appellant was guilty, or, alternatively, gave that impression. Secondly, Mr. Meiklejohn argues that the conviction was against the weight of the evidence.

So far as the first limb of the argument is concerned, Mr. Meiklejohn drew our attention to the following exchange which took place between the Magistrate and counsel at the conclusion of the prosecution case.

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JUDGE SOWDEN: "Now the prosecution evidence closed yesterday and there is still mileage in a discount if your client goes into the box and produces his witnesses and I'm required to conclude the trial then should I find him guilty. He's lost his discount. There is still time".

ADVOCATE LANDICK: "I do understand that, Sir".

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JUDGE SOWDEN: "Now, would you like five minutes with the assistance with the interpreter to explain that very carefully to him"?

ADVOCATE LANDICK: "As you have specifically asked me to raise it with him at this stage I shall, Sir".

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JUDGE SOWDEN: "I'd be very grateful. There is one more thing and that is it's not known for defence counsel to seek an indication in Chambers from the Judge as to what he would do with the defendant, subject to mitigation, in the event of a guilty plea and if you wish to see me in Chambers I'm quite happy to see you in Chambers. At your request or an indication I'll now withdraw to give you an opportunity to explain things to your defendant client".

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Mr. Meiklejohn submitted that these comments indicated that the Magistrate had formed a view before hearing the evidence for the defence.

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Mr. Robinson, for the Attorney General, reminded us that counsel for the appellant who appeared in the Police Court - a different counsel we might say from his current counsel - had later expressed gratitude for the opportunity to explain the system of discounts to his client.

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We think that it was perhaps unfortunate that the Magistrate chose that moment to make his remarks. We are sure that he intended the best, but his remarks did have the propensity to give the defendant the impression that the Magistrate's mind had been made up by that stage and that it would be better if the appellant pleaded guilty.

The second exchange relied on by Mr. Meiklejohn, in support of his first submission, was on the following lines and came during the examination of the defendant:

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WITNESS: "Mr. Cairns is showing the pocket where he placed the mirrors".

JUDGE SOWDEN: "Ah, now, that's the first time we've heard anything about being put in pockets. So were they then put in the pockets inside his jacket"?

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WITNESS: "Yes, inside the pocket".

JUDGE SOWDEN: "Inside the pocket. Would he please take off his jacket and pass it to me. Thank you. Has this jacket been cleaned since"?

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ADVOCATE LANDICK: "10th September".

JUDGE SOWDEN: "10th September".

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WITNESS: "No, Sir".

JUDGE SOWDEN: "Well, I don't believe him".

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ADVOCATE LANDICK: "You don't believe...."?

JUDGE SOWDEN: "I don't believe him. I'll pass you the jacket".

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ADVOCATE LANDICK: "When you say you don't believe him, you don't believe...."?

JUDGE SOWDEN: "I don't believe that they were ever put in there. It's as white as the driven snow. Please pass it to counsel. I also don't believe that they would have fitted in there, that's another thing".

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We agree with counsel for the appellant that this exchange could have given the appellant the impression that the Magistrate had made up his mind before hearing all the evidence for the defence.

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We were referred to a passage from Archbold's "Criminal Pleading and Practice" at para. 7-64 where the learned editors state:

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"Whilst strong comment in an appropriate case is permissible, the judge should never give an express indication of his own disbelief in relation to the evidence of a witness, let alone that of the defendant: *R. v. Iroegbu*, *The Times*, August 2, 1988".

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We adopt that dictum. It is not desirable, during the course of a contested trial, that a Magistrate should comment adversely upon the credibility of a witness and certainly not upon the credibility of a defendant. He can certainly test the evidence of a defendant by searching cross-examination, but he should not

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allow himself to express any conclusion until all the evidence has been heard and any submissions to be made by counsel have been completed.

5 We therefore find that, in relation to the first submission made by counsel for the appellant, the Magistrate did conduct himself in such a way as to allow the impression to be created - an impression which we are sure is false - that he had made up his mind about the guilt of the defendant before hearing all the evidence in the case. On this ground alone we would allow the appeal and set aside the conviction.

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15 However, in fairness to the appellant, we think that we should deal also with the second ground of appeal which was that the conviction was against the weight of the evidence. The principal evidence against the appellant was the evidence of a man called da Sousa. He gave evidence that the appellant saw the wing mirrors in the garage where he (da Sousa) worked and said "*with a little paint, these would fit my motorbike just right*". Da Sousa said that the appellant then picked up the wing mirrors, placed them inside his jacket, and walked out of the garage. This witness also testified that the appellant was told that the mirrors belonged to someone else.

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25 The appellant's story was that he was told by da Sousa that he could take the wing mirrors. We interpose that the mirrors were very rusty and were estimated to be worth considerably less than the figure of £80 contained in the charge sheet. The appellant's evidence was supported by a man called de Freitas, who had been present at the time, and who said that da Sousa had first offered the mirrors to him and had stated that they were going to be thrown away.

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35 The prosecution also called a witness named Cornick. Cornick was employed in the same garage as da Sousa and de Freitas but was not present when the mirrors came into the possession of the appellant. Cornick stated that the appellant had readily admitted taking the wing mirrors, when tackled about it, and said that he would return them "*next Saturday*". In fact the appellant did not do so, but it appears that he had been given extra work on the farm and it was suggested that he might have forgotten to bring them with him when eventually he came into St. Helier. Be that as it may, when the police went out to the farm very shortly after, the mirrors were in a carrier bag but not concealed in any way.

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50 The appellant put his character in issue. He is aged 28 and has no previous convictions. His employer, Mr. Perchard, gave evidence that he was a trustworthy employee, who had actually pointed out a small overpayment of wages which had been made to him.

In the judgment of the members of this Court, the conviction flies in the face of the evidence. There appears to us to be no convincing evidence that the appellant intended to steal these mirrors and we accordingly conclude that the conviction ought to be set aside on that ground of appeal also. We accordingly allow the appeal, we quash the conviction and we order the prosecution to pay the costs of the appeal.

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Authorities

Archbold: paras 7-29; 7-30; 7-38 to 7-40; 7-63 to 7-64; 7-71
to 7-72A; 7-112.

R. -v- Iroegbu "The Times": 2nd August, 1988.

R. -v- Cooper (1969) 1 QB 267.

Court of Appeal (Jersey) Law, 1961: Article 25.

Police Court (Miscellaneous Provisions) (Jersey) Law 1949: Articles
14, 17.

A.G. -v- Evans (1965) JJ 527 @ 531

A.G. -v- McGuffie (1968) JJ 955 @ 957.