In the Supreme Court of St. Helena

Citation: SHSC 8/2022

Criminal

Ruling on appeal by Attorney General against acquittal

Attorney General

-v-

Michele Wheeler

&

Charles Wheeler

Ruling dated 16th June 2022

The Chief Justice, Rupert Jones

1. This is my ruling on the appeal against acquittal in this case.

2. Pursuant to section 244 of the Criminal Procedure Ordinance 1975, the Attorney General (the Appellant) appeals to the Supreme Court against the acquittal of both Michelle Wheeler and Charles Wheeler (the Respondents) following a trial in the Magistrates' Court on 4th and 7th March 2022. The Appellant pursues nine grounds of appeal in the petition of appeal.

3. On 27 May 2022, I held a hearing by remote video technology at which Mr Brown, Crown Counsel, appeared for the Appellant and Mr Davis, of the Public Solicitor's Office, appeared for the Respondents. I am extremely grateful to them both for the quality of their written and oral submissions. I have read all the material provided to me including the trial transcripts and the Magistrates' rulings refusing a submission of no case to answer and acquitting the Respondents at the conclusion of the trial.

Factual Background

4. Both Respondents stood trial in relation to offences contrary to Regulation 8 of the Public Health (Prevention of Formidable Diseases) (Coronavirus No. 2) Regulations 2020 ("the regulations") as enacted under the Public Health Ordinance 1939.

5. The charges related to the conduct of both Respondents on 25 January 2022, and the nature of the allegations was set out in the case summary. I adopt the summary of the evidence in the prosecution's case as set out in the Magistrates' Court ruling on the no case to answer submission:

   5.In summary the prosecution evidence in this case is that on 24th January 2022 Charles Wheeler entered St Helena by air. He was directed to isolate at Cliff Top for 10 days. This property is the address of his mother, the first defendant. Prior to his arrival his mother vacated the house however a dog was to remain. Advice was sought from a proper officer as to the walking of the dog and verbal advice was given to Miss Wheeler only regarding how the dog was to be transferred from Mr Wheeler to her, namely that they were to stay some 2 metres apart and the dog was to be released by Mr Wheeler so it could go to Miss Wheeler and vice versa at the end of the walk.

   6.Both parties had access to an advice sheet regarding walking of dogs for those in isolation. This document is provided to those in isolation but the relevant extract was provided to Miss Wheeler by the proper officer. This document makes no reference to the parties having to stay a certain distance apart. The advice includes the following, 'other people can walk your dog for you but they should have no contact with you when collecting the dog. If possible they should keep the dog's lead during the quarantine period to minimise possible contamination and wash their hands before and after handling the dog.' This advice does, unfortunately, allow for lead sharing in circumstances where the parties do not touch each other.

   7.On the 25th January 2022 a neighbour, Sylvia Yon, says that she saw Miss Wheeler attend the property. She shouted for her son and she says that she saw her open the gate by putting her hand over it, her son then passed her the dog and she left. About 15 minutes later Miss Wheeler returned and shouted for her son again. Mrs Yon did not see the dog handed back as she was attending to her grandchild. She does however say that she saw Miss Wheeler leave and that although she had a black bag with her when she arrived she left with the black bag and a grey bag. She says she is not sure if her son passed her this bag.

   8.The witness took some photographs but these only capture the time that Miss Wheeler arrived at the property. One photograph appears to show, on one interpretation, that Miss Wheeler is leaning over the gate which would be preparatory to opening it. The second photograph appears to show, again on one interpretation, the two defendants close to one another. Mr Wheeler has his right harm outstretched and Miss Wheeler has her left arm also outstretched towards Mr Wheeler's hand. We stress that this is one interpretation of the photographs.'

6. The prosecution brought three charges under regulation 8 alleging the Respondents had committed criminal offences.

7. It was alleged that Charles Wheeler breached the requirement to isolate in that he had physical contact with Michele Wheeler; that he was in close proximity with her, and that he handed her a grey bag (an offence contrary to regulation 8(1)(a)).

8. Michele Wheeler was accused of doing acts which assisted Charles Wheeler to breach isolation (touching him, remaining within close personal proximity to him, and removing the grey bag) (an offence contrary to regulation 8(1)(c)).

9. It was also alleged that Michele Wheeler had entered into a location where Charles Wheeler was in isolation by reaching her arm over the isolation boundary in order to open a gate to the garden of the property at which he was isolating (an offence contrary to regulation 8(1)(e)).

10. The trial commenced on 4 March 2022 and concluded on 7 March 2022. The Magistrates' Court ('the Court') heard oral evidence from Sylvia Yon, Karl Martin and Georgina Young on behalf of the prosecution.

11. At the conclusion of the prosecution's case, Mr Davis (defending Michele Wheeler) made a submission of no case to answer. That submission was rejected and the Court's written ruling dated 7 March 2022 gave reasons for finding that there was a case to answer on all charges.

12. Relevant parts of the Court's ruling on no case to answer ('the no case to answer decision') and interpretation of the regulations are set out below. No criticism has been made of the no case to answer decision and I can detect no error of law in the approach taken:

> [On Regulation 8(1)(a)]
> 12.… We could also find that a virus is transmitted by physical contact between two people, that of itself maybe within the knowledge of this tribunal. There is advice given by the health authorities to those in isolation which is aimed partly at preventing the transmission of the disease. That advice can help inform us whether a defendant has remained in isolation so as to prevent infection or contamination with coronavirus given its provenance, but breach of guidance does not necessarily translate into a conviction.
>
> 13.As we are having to rely upon advice given to a certain extent as to whether an isolation is breached, even if the lead were in fact passed we could not convict on that basis unless the two of them touched one another, which is specifically prohibited by the guidance on dog walking. There is no evidence that they touched at the time of transfer.
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> 14.It is however a finding that this court could make that passing a bag and touching could amount to someone not remaining separate from another person in such a manner as to prevent infection or contamination with coronavirus. There is therefore a case to answer against Charles Wheeler. We do not need to go any further than that at this stage and address whether being in very close proximity, but not touching, is a breach of isolation.
>
> [On Regulation 8(1)(c)]
> 15.Turning to Miss Wheeler she is charged with assisting Mr Wheeler to breach isolation. The offence charged is knowingly assisting Charles Wheeler to breach isolation. Knowingly infers an appreciation that the assistance offered would assist Mr Wheeler in breaching any regulation. It does not infer a requirement that Charles Wheeler intended, at the time of assistance, to breach isolation.
>
> 16.Further, the way the regulation and charge is worded we will interpret this as meaning that Charles Wheeler must also breach isolation. The legislation is drafted so that the assistance to another is to breach or attempt to breach isolation, as opposed

to doing something that is capable of assisting someone to commit or attempt to commit the offence. In the absence of the regulations being clear on the point we will take this, in fairness to Miss Wheeler, as meaning Charles Wheeler must commit an offence and she must assist him in doing so.

…

21.We therefore interpret assisting by way of its ordinary meaning, namely providing some help. We do not rule out that encouraging may in some circumstances amount to assistance.

22.We find that taking from Mr Wheeler a bag and reaching to touch him are positive acts that could amount to assisting him in breaching the isolation. There is consequently a case to answer for this charge.

[On Regulation 8(1)(e)]

23.We now deal with what is required for 'entry' for offences contrary to reg. 8(1)(e). The Public Solicitor submits that this is a regulatory offence and that as the transmission of the disease requires close contact the prohibition on entry to any premises must relate to a substantial entry.

24.We have no hesitation in rejecting this submission. …

….

26.For that reason we consider that any entry, so long as it is done knowingly, amounts to an entry for the purposes of the legislation. The extent of the entry is consequently a matter for mitigation.

13. Following the no case to answer decision Michele Wheeler gave evidence in her defence but Charles Wheeler did not give evidence, as was his right.

14. Both Respondents were acquitted of all charges. The Court's written ruling after trial was 27 paragraphs long and dated 7 March 2022.

Grounds of appeal

15. The Attorney General appeals the acquittals submitting that the Magistrates' Court erred in law based on the following nine grounds of appeal:

    i. The decision not to draw an inference from Michele Wheeler relying on facts she failed to mention to the police when questioned was erroneous in law;

    ii. The refusal to admit into evidence Michele Wheeler's second prepared statement given to the police was erroneous in law;

    iii. The decision not to draw an inference from Charles Wheeler's failure to give evidence was erroneous in law;

    iv. The refusal to allow the prosecution to enter into evidence the entirety of Charles Wheeler's police interview, (specifically the comments he made after being cautioned when reported for the consideration of prosecution), was erroneous in law;

v. As Charles Wheeler did not give evidence, the decision to afford him the credibility limb of the good character direction was erroneous in law;

vi. The Magistrates' decision to rely on guidance provided in a Government press release issued in July 2021 when determining the issue of separation was erroneous in law;

vii. The determination that Michele Wheeler did not reach over the gate was one which no reasonable court, properly directing itself could have reached.

viii. The determination that Michele Wheeler and Charles Wheeler were sufficiently far apart so as Charles Wheeler did not breach isolation was one which no reasonable court, properly directing itself could have reached.

ix. The Magistrates' Court erred when determining the issue of bail conditions.

The Law

The Coronavirus (COVID 19) Regulations

16. The Respondents stood trial charged with offences contrary to regulations 8(1)(a), (c) and (e) of the Public Health (Prevention of Formidable Diseases) (Coronavirus No.2) Regulations 2020 (the 'regulations'). The regulations were in force from 7 October 2020 and amended by a series of amendment regulations between 2020 and 2022, most relevantly to this case, on 27 November 2020 and 17 June 2021.

17. Pursuant to s.49 of the Public Health Ordinance 1939 the regulations were enacted to prevent the spread of Coronavirus, also known as COVID 19.

18. The following regulations which applied as at 25 January 2022 were of relevance:

i. Reg. 2 defined 'isolation' in relation to a person as meaning the separation of the person from any other person in such a manner as to prevent infection or contamination with coronavirus;

ii. Reg. 4(1) required those that entered St Helena by air at the relevant time to remain in isolation for 10 days at such location as directed by a proper officer;

iii. Reg. 4(2C) required those in isolation to comply with all other conditions as directed by a proper officer and to submit to testing when required;

iv. Reg. 4(3) required any directions made by a proper officer to be reduced to writing if made orally;

v. Reg. 8(1) created a number of offences which included:

a. Breaching or attempting to breach isolation – 'breaches or attempts to breach the requirement to remain in isolation as required under regulation 4(1) or (2)';

b. …..

c. Knowingly assisting, or attempting to assist, another to breach or attempt to breach isolation – 'knowingly assists or attempts to assist another person to

breach or attempt to breach any such regulation, order, direction or condition';

d. ….

e. Knowingly and without reasonable excuse (the burden of proving which is on the person) entering, or attempting to enter, a location where a person or persons are in isolation in accordance with the regulations.

19. As set out above, the offences with which the Respondents were charged were those contrary to regulations 8(1) (a), (c) & (e).

The jurisdiction of the Supreme Court on appeal

20. The jurisdiction of the Supreme Court on an appeal against acquittal is set out in section 244 of the Criminal Procedure Ordinance as relevant:

> **Right of appeal against acquittal**
> **244. (1)** The prosecutor may appeal to the Supreme Court against a decision or determination of the Magistrates' Court on any of the following grounds, namely:
> *(a)* that the decision or determination was erroneous in law;
> *(b)* that the decision or determination was one which no reasonable court, properly directing itself in law, could have reached;
> ....

21. If either of the grounds in section 244(1)(a) or (b) is established then the Supreme Court does not have the power to substitute its own verdict and convict the Respondents – this is in contrast to its power to substitute an acquittal where an Appellant is successful in an appeal against conviction (see section 250(2)(a)) or the power to reverse other orders on appeal in section 252. The power under section 251 (as set out below) is limited to one of remittal to the Magistrates' Court for re-determination including by way of retrial with appropriate directions this Court thinks necessary:

> **Powers of Supreme Court on appeal against acquittal**
> **251.** On an appeal against an acquittal or dismissal, the Supreme Court may remit the case together with its judgment on it to the court of trial for determination, whether or not by way of rehearing, with any directions the Supreme Court thinks necessary.
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> **Powers of Supreme Court on appeal against other orders**
> **252.** The Supreme Court may on any appeal from against any order other than a conviction, acquittal or dismissal alter or reverse any such order.

The Magistrate's Court's ruling after trial

22. The Magistrates' Court gave itself the following directions on the law at the conclusion of the trial as set out within its decision at paragraphs 4 onwards:

The Law

4. Some matters of law were addressed in the ruling in relation to submissions as to whether there is a case to answer. We will not rehearse them here.

5. We remind ourselves of the burden and standard of proof.

6. Mr Wheeler has not given evidence at trial. An inference from not doing so cannot of itself prove guilt. The defendant's interview is part of the evidence but it has not been tested on oath under cross examination. We can only draw an inference if we are satisfied that the prosecution case is so strong that it calls for an answer and that Mr Wheeler had no answer that he believed would stand up to cross-examination.

7. Miss Wheeler was interviewed and during her interview she did not mention that what photograph 1 depicted could have been her drinking from a bottle or using a telephone. The AG seeks an inference from her silence in interview on this point. The conclusion that we may draw from this, if it is fair to do so, is that this evidence is a recent fabrication if there was no sensible reason for her to fail to mention it when being questioned, and that the prosecution case at the time of the interview was such that it clearly called for an answer.

8. Both defendants are of good character. This of itself does not provide a defence. Both defendants are entitled to both limbs of the direction as although Mr Wheeler has not given evidence he is relying on his police interview.

23. The Magistrates' Court interpreted and applied the law and made the following findings of fact in its decision acquitting the Respondents:

<u>Findings</u>

20. We cannot find that Miss Wheeler reached over the gate to open it. The photograph is not clear on the point. Mrs Yon's evidence is that the gate was opened and the dog passed. Yet the second photograph which was taken after the gate was supposedly opened shows the gate closed and Miss Wheeler does not have the dog. We cannot be sure the gate was opened at any time between photo 1 and photo 2 and in fact we have other photographs that show the dog being released to Miss Wheeler that depict Mr Wheeler opening the gate. It follows from this that we draw no inference from silence on whether she was using a phone or drinking water. Miss Wheeler is accordingly not guilty of entering the property.

21. In relation to Mr Wheeler we cannot find the grey bag was passed between the two defendants as this was never observed and was an assumption of Mrs Yon's. We cannot find the two defendants touched as the photograph is unclear and Mrs Yon simply says that it appeared as if they touched.

22. This leaves us with whether the two defendants were so close to one another that Mr Wheeler was not in isolation. The photograph was taken from an angle and we can't say how close they were from that. However Mrs Yon said that the two of them looked to be a metre apart and Miss Wheeler says they were 2 metres apart.

23. We have to rely upon the material before us to help us in deciding if Mr Wheeler was no longer in isolation, i.e. separate from Miss Wheeler in such a manner as to prevent infection or contamination with coronavirus. A government press release from July 2021 is in the bundle. This quotes Public Health England advising that transmission of the virus requires close contact with an infected person which it defines as:
    i. Face to face contact with someone less than a metre away
    ii. Being within one metre for one minute or longer with face to face contact
    iii. Being within two metres of someone for more than 15 minutes.

24. We simply cannot make any findings as to how long Miss Wheeler was at the gate. We have no measurements as to the length or otherwise of the steps which would help us with distances. Mrs Yon gives an estimate of them being 1 metre apart. The guidance suggests the importance of face to face contact in the transmission of the virus if parties are only together for short periods of time.

25. In the no case to answer ruling we have already addressed the problems of guidance being relied upon to inform the court, the July 2021 guidance for example is different from the simple '2 metre rule' issued by the St Helena health authorities for those in isolation. This makes reliance upon the guidance documents we have seen problematic. Even if we could rely upon the July 2021 document to inform us the two defendants cannot be found to have fallen foul of it as we simply cannot be certain how close they got to one another or for how long.

26. In light of these findings we can draw no inference from Mr Wheeler not giving evidence, the prosecution case simply is not strong enough for us to do so.

27. Accordingly Mr Wheeler is not guilty of breaching isolation and it follows that likewise Miss Wheeler is not guilty of assisting him in breaching isolation.

The Grounds of Appeal considered

24. I address the grounds of appeal in order.

Ground 1 - the decision not to draw an inference from Michele Wheeler relying on facts she failed to mention to the police when questioned was erroneous in law

25. Mr Brown submitted that the Magistrates' Court's erred in law in deciding not to draw an inference from Michele Wheeler relying on facts she failed to mention to the police when questioned.

26. During her police interview on 4 February 2022 Michele Wheeler elected to answer "no comment" to police questions and chose instead to give her account by way of two prepared statements.

27. During police interview, Michele Wheeler was asked specifically about photograph exhibit JC/01a (page 4 of the transcript):

LW	Thank you. I'm just gonna show you this photograph. This is JC/01A. Who's the lady in the photograph?
MW	No comment
LW	There's a lady there in a black dress with red at the bottom is that lady yourself?
MW	No comment
LW	Next to the lady looks to be a bag, is that a bag, is that correct?
MW	No comment

LW	We can see from the photo there's a white wall, there's a gate and what are you doing? Looking at that photo what would you say you are doing?
MW	No comment
LW	Are you opening the gate?
MW	No comment
LW	Are you leaning over the gate?
MW	No comment

28. Mr Brown submitted that during her oral evidence at trial, Michele Wheeler asserted that photograph JC/01a did not show her reaching over the gate, but in fact showed the moment she was either drinking from a water bottle, or holding her mobile phone. Indeed the defence was run in that way and that fact was relied on. Michele Wheeler conceded during cross-examination that she failed to mention that to the police and offered no sensible reason for that failure.

29. Section 110A of the Criminal Procedure Ordinance 1975 sets out:

> **Effect of defendant's failure to mention facts when questioned or charged**
> **110A. (1)** Subsection (2) applies if, in any proceedings against a person for an offence, evidence is given that the defendant—
> (a) at any time before he or she was charged with the offence, on being questioned under caution by a police officer trying to discover whether or by whom the offence had been committed, failed to mention any fact relied on in his or her defence in those proceedings; or
> (b) on being charged with the offence or officially informed that he or she might be prosecuted for it, failed to mention any such fact,
>
> being a fact which in the circumstances existing at the time the defendant could reasonably have been expected to mention when so questioned, charged or informed, as the case may be.
> **(2)** If this subsection applies—
> (a) a magistrates' court inquiring into the offence as examining justices;
> (b) the court, in determining whether there is a case to answer; and
> (c) the court or jury, in determining whether the defendant is guilty of the offence charged,
>
> may draw such inferences from the failure as appear proper.

30. Mr Brown submits that Michele Wheeler did not offer an explanation during her police interview to JC/01a, nor did she mention that at the time the photograph was taken she was either taking a drink from a bottle, or holding her mobile phone. It is submitted that these were facts which in the circumstances existing at the time, she could reasonably have been expected to mention when questioned.

31. The Court of Appeal of England and Wales has considered in great detail the use of prepared statements in police interviews, and the consequences on the drawing of inferences. The leading case is *R v. Knight [2003] EWCA 1977* where Laws LJ said:

"The making of a pre-prepared statement is not of itself an inevitable antidote to later adverse inferences. The pre-prepared statement may be incomplete in comparison with the defendant's later account at trial, or it may be, to whatever degree, inconsistent with that account. One may envisage many situations in which a pre-prepared statement in some form has been put forward, but yet there is a proper case for an adverse inference arising out of the suspect's failure "on being questioned under caution… to mention any fact relied on in his defence…". We wish to make it crystal clear that of itself the making of a pre-prepared statement gives no automatic immunity against adverse inferences"

32. Mr Brown submitted that Michele Wheeler's prepared statement was incomplete in comparison to her later account at trial, in that she failed to mention when questioned under caution her account and explanation for her conduct shown in exhibit JC/01a.

33. The Magistrates' Court set out at paragraph 7 of the ruling after trial:
"The AG seeks an inference from her silence in interview on this point. The conclusion that we may draw from this, if it is fair to do so, is that this evidence is a recent fabrication if there was no sensible reason for her to fail to mention it when being questioned, and that the prosecution case at the time of the interview was such that it clearly called for an answer."

34. Mr Brown submitted that at the time of the police interview, JC/01a called for an answer. He submitted that there was no sensible reason for Michele Wheeler not to give an account to the police in respect of JC/01a, and no sensible reason for that failure was advanced on oath.

35. At paragraph 20 of the same ruling, the Magistrates' Court held that no inference could be drawn in respect of Michele Wheeler's silence on whether she was drinking water or holding her phone. The court reasoned that:
"We cannot be sure the gate was opened at any time between photo 1 and photo 2 and in fact we have other photographs that show the dog being released to Miss Wheeler that depict Mr Wheeler opening the gate. It follows from this that we draw no inference from silence on whether she was using a phone or drinking water."

36. He submitted that the rationale set out by the Magistrates' Court in paragraph 20 is not the correct legal test as set out in section 110A(1)(a). The court did not need to be sure that the gate was opened to draw an inference, only that there was it was reasonable to expect Michele Wheeler to provide an answer to JC/01a during police questioning. It is submitted that the Magistrates' Court did not correctly apply s.110A(1)(a) and the decision not to draw an inference was erroneous in law.

Discussion on Ground 1

37. Section 110A(1)(a) & (2)(c) of the Criminal Procedure Ordinance 1975 afford a broad discretion to the Court to draw such inferences as appear proper from the defendant's failure to mention facts on police questioning under caution (in interview) that they could reasonably have been expected to mention. The adverse inferences that may be drawn

include that a defendant has recently fabricated evidence that they now rely on in evidence at trial on the same issue. However, that is not the only type of inference that may be drawn (see for example English cases such as *Beckles* [1999] Crim LR 148). Other types of adverse inferences may be general inferences of a defendant's guilt or of additional support for the prosecution case. However, an inference on its own could not be determinative to found guilt – see cases on the equivalent provision under section 34 of the Criminal Justice and Public Order Act 1994 in England – such as *Murray v UK* (1996) 22 EHRR 29 and *Birchall* [1999] Crim LR 3111.

38. Given the broad discretion whether to draw any inferences at all, a court is technically not required to draw adverse inferences, even if it decides there is no explanation for a failure to mention a fact which an accused could reasonably have been expected to mention in interview. However, it may well be reasonable for the Court to draw adverse inference in such circumstances because it would be 'proper'. It will always be a fact specific decision.

39. The Court exercised its discretion not to draw an inference against Ms Wheeler for the reasons set out in its ruling at paragraph 20:

> 20. We cannot find that Miss Wheeler reached over the gate to open it. The photograph is not clear on the point. Mrs Yon's evidence is that the gate was opened and the dog passed. Yet the second photograph which was taken after the gate was supposedly opened shows the gate closed and Miss Wheeler does not have the dog. We cannot be sure the gate was opened at any time between photo 1 and photo 2 and in fact we have other photographs that show the dog being released to Miss Wheeler that depict Mr Wheeler opening the gate. It follows from this that we draw no inference from silence on whether she was using a phone or drinking water. Miss Wheeler is accordingly not guilty of entering the property.

40. Whilst it may be the case that the evidence as it was partially presented by the police to Ms Wheeler in interview called for an answer, the Court nonetheless had a discretion as to whether to draw an adverse inference; a discretion limited only to that which was proper - reasonable and fair.

41. In order to demonstrate an error of law it would not be sufficient to find that I might have exercised my discretion differently, it would need to be demonstrated that the exercise of discretion was irrational, perverse or unreasonable.

42. In this case, the facts that had not previously been mentioned in Ms Wheeler's no comment interview (nor in her prepared statement) were not necessarily the most significant ones because they did not constitute the core denial of the offence. Nonetheless, the prosecution submitted that there was a significant failure or omission in her interview account and I accept they were of some significance. It was open to the Court to draw an inference that Ms Wheeler recently fabricated her account and did indeed reach over the gate to open it. Nonetheless, I am satisfied it was equally open to the Court in their discretion to accept Ms Wheeler's evidence and not to draw any adverse inference from her failure to mention

matters in interview for the reasons it gave. The Court gave rational reasons for deciding it was not proper to draw any inference.

43. I do not accept the submission set out at paragraph 36 above that the Court misapplied the test in section 110A(1)(a) & (2)(c) – it amounts to a submission that the lack of reasonable explanation is the only and determinative matter to be taken into account when exercising the discretion to draw an adverse inference. I do not accept this. A lack of reasonable explanation for a failure to mention matters would be a highly relevant factor but not determinative in exercising the discretion. Other factors that may be taken into account when exercising the discretion might include: the relevance and importance of the matters not mentioned; the evidence (if any) now given by a defendant on the same issue; any other evidence which goes to a defendant's credibility; and the totality and strength of all the evidence in the case.

44. The Court did not make any finding that Ms Wheeler had no reasonable explanation for her failure to mention matters in interview that she later relied upon.

45. I accept that it would have been preferable for the Court to have made a clear and explicit finding as to whether a reasonable explanation had been provided by Ms Wheeler for the failure to mention matters. Nonetheless, this was not a material error. In this case there was an explanation provided by Ms Wheeler for the failure to give answers in interview which the Court could have (and appears to have implicitly) accepted. Ms Wheeler provided an explanation for her omission to mention a water bottle or a mobile phone in interview when cross-examined during the trial, explaining that she had not been clear at interview on that of which she had been accused. It was open to the Court to find that she did not know that of which she was accused, did not appreciate the significance of the question, and did not answer for that reason, and therefore not to draw an inference that she had no answer nor that her evidence at trial was recent fabrication.

46. The Court was entitled not to draw inferences and accept the defence and explanation provided in her oral evidence when there was other evidence in support of Ms Wheeler's explanation being credible. In its ruling, the Court referred to other photographs,' which the Court found 'show the dog being released to Miss Wheeler and depict Mr Wheeler opening the gate.' These other photographs were not shown to Ms Wheeler in interview. Given that Ms Wheeler was shown in interview only a selection of photographs and not the other photographs that were in the possession of the police, I accept Mr Davis's alternative submission that it would have been open to Court to find it proper, in any event, not to draw any inference.

47. I accept Mr Davis' observation that the interviewing officer, Lisa Winterburn, referred generically at the commencement of the interview to 'a possible breach of quarantine' in the singular and without further specification as to which of the offences under regulation

8 Public Health (Prevention of Formidable Diseases) (Coronavirus No. 2) Regulations 2020 Ms Wheeler was suspected to have committed.

48. I do accept Mr Brown's submission that the police set out the broad nature of the allegations of the interview and were not required to lay out in a high degree of specificity, each and every offence that might be pursued. However, the Court would have been entitled to take the lack of specificity of all the offences under investigation into account and accept Ms Wheeler's explanation for her silence on questioning as being credible.

49. Further and in any event, the Court decided it would not be proper to draw an inference where the evidence as a whole did not support a finding that Ms Wheeler opened the gate. There is no material error of law in examining all the evidence in the case before deciding whether it would be proper to draw an adverse inference from an accused's failure to give an answer on a specific issue or not. The Court did not simply have to decide whether it was reasonable for Ms Wheeler to provide an answer at the time of interview before deciding whether to draw an adverse inference. This is all the more so when Ms Wheeler had given a general account in her first prepared statement denying the offences stating that her son opened the gate, there was no physical contact and she was appropriately distanced from him.

50. The Court found that there was insufficient evidence to convict Ms Wheeler. I am satisfied that even if the Court had drawn an adverse inference, this would not have affected its ultimate decision, based on an overall assessment that there was insufficient evidence to prove her guilt.

51. I am satisfied that the Court did not err in law in any material manner in failing to draw an inference against Ms Wheeler and dismiss this ground of appeal.

<u>Ground 2 - the refusal to admit into evidence Michele Wheeler's second prepared statement given to the police was erroneous in law</u>

52. The second ground of appeal was that the Court erred in refusing to admit into evidence Michele Wheeler's second prepared statement given to the police.

53. During her police interview, Michele Wheeler advanced two prepared statements. Both were served as part of the prosecution case and were intended to be relied on by the Crown. A section 10 admission was agreed that: *"During interview, Michele Wheeler advanced two prepared statements which are exhibited as LJW/5 and LJW/6"*.

54. As part of the Crown's case, the first prepared statement (LJW/5) was read into evidence. At the point the Crown intended to adduce the second statement (LJW/6) as evidence,

the bench ruled that the statement ought not to be read out and entered into evidence, as it did not paint Michele Wheeler in a good light.

55. Mr Brown submitted that there was no legal justification or power to exclude this prepared statement from evidence in the manner set out by the Magistrates' Court. The defence made no application to exclude this evidence, nor was the test contained within section 67 of the Police and Criminal Evidence Ordinance 2003 met, or indeed applied. The prepared statement was signed by Michele Wheeler and the contents read out under caution during her police interview. As the Magistrates' Court had determined that there was a case to answer, it follows that Michele Wheeler's credibility and character were live issues. The contents of the second prepared statement went to those issues. It follows that it was admissible evidence and the decision to refuse to admit this statement into evidence was erroneous in law.

Discussion on Ground 2

56. Section 67 of the Police and Criminal Evidence Ordinance 2003 provides as follows:

> Exclusion of unfair evidence
> 67. (1) In any proceedings the court may refuse to allow evidence on which the prosecutor proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.
> (2) Nothing in this section affects any rule of law requiring a court to exclude evidence.

57. It follows that the court has a free-standing discretion to exclude such evidence as it is satisfied would have such an adverse effect on the fairness of the proceedings that it ought not to admit it. The power may be exercised of the court's own initiative - an application by the defence is not a pre-requisite for the exercise of the court's discretion. The court may, of its own motion, decide to exclude evidence.

58. The second prepared statement of Ms Wheeler was characterised in the Attorney General's opening as Ms Wheeler "throwing allegations," whereas it might also be reasonably characterised as her expression that she was aggrieved by what she perceived to be unfairness in her treatment. To the extent that it reflected on the character of Ms Wheeler at all, it was not evidence of a propensity to be untruthful or one for reprehensible behaviour. It was rational and the Court was entitled to decide that the second prepared statement was irrelevant as well as unfair to admit.

59. I am satisfied that the Court did not err in law in excluding the second prepared statement. It was irrelevant to the legal and factual matters at issue in the case. The Court was entitled to exclude it on the basis that it was irrelevant as much as that its admission was unfair to Ms Wheeler. The exercise of the Court's discretion was rational and open to it.

60. I dismiss this ground of appeal.

<u>Ground 3 - the decision not to draw an inference from Charles Wheeler's failure to give evidence was erroneous in law</u>

61. The third ground of appeal was that the court erred in not drawing an inference from Charles Wheeler's failure to give evidence.

62. Charles Wheeler did not give evidence at the trial. Whilst Mr Brown accepted that such a refusal to give evidence can never alone prove guilt, he submitted that the court was entitled to draw an adverse inference where the provisions of section 110B(2) of the Criminal Procedure Ordinance 1975 are met:

> "…if he or she chooses not to give evidence, or having been sworn, without good cause refuses to answer any question, it will be permissible for the court or jury to draw such inferences as appear proper from his or her failure to give evidence or his or her refusal, without good cause, to answer any question."

63. The Magistrates' Court directed itself as follows (paragraph 6 of the ruling after trial):
> "We can only draw an inference if we are satisfied that the prosecution case is so strong that it calls for an answer and that Mr Wheeler had no answer that he believed would stand up to cross-examination"

64. The Court went on to state (at paragraph 26):
> "In light of these findings we can draw no inference from Mr Wheeler not giving evidence, the prosecution case simply is not strong enough for us to do so."

65. Mr Brown submitted that the test applied by the Magistrates' Court at paragraphs 6 and 26 is not the correct legal test when determining whether to draw an adverse inference.

66. In the case of <u>*Murray v DPP [1994] 1 WLR*</u> the Court of Appeal of England and Wales held that once it had been decided that there was a case to answer, the failure of the accused to give evidence made the drawing of an inference permissible.

67. In order to draw an adverse inference from a failure to give evidence, a court must be satisfied that there is a case to answer (<u>*R v. Cowan [1996] QB 373)*</u>. The Magistrates' Court in this case made that determination upon delivering the ruling on the submission of no case to answer. In <u>*Cowan*</u>, the Court of Appeal set out the correct approach when dealing with inferences from a failure to given evidence:

    1) The Court must direct that the burden of proof remains on the prosecution throughout.

2) The Court must direct that the defendant is entitled to remain silent.

3) The Court must direct that a failure to give evidence cannot on its own prove guilt.

4) The Court must direct that it must be satisfied the prosecution have established a case to answer before drawing inferences from silence.

5) The Court must direct that an adverse inference can only be drawn if the defendant's silence can only sensibly be attributed to him having no answer, or none that would stand up to cross-examination.

68. Mr Brown submitted that it followed that the Magistrates' Court erred in paragraphs 6 and 26 of its ruling when directing itself as to whether an inference could be drawn. The correct legal test was not applied and, having made a determination that there was a case to answer, the court ought to have then considered whether Charles Wheeler's silence could only sensibly have been attributed to him having no answer, or none that would stand up to cross-examination. The court did not adopt this approach, and therefore the decision not to draw an adverse inference was erroneous in law.

Discussion on Ground 3

69. I am satisfied that the Magistrates' Court appears to have misdirected itself on the application of adverse inferences against Mr Wheeler in the way that Mr Brown submits by stating at [26]:

> "In light of these findings we can draw no inference from Mr Wheeler not giving evidence, the prosecution case simply is not strong enough for us to do so."

70. It appears to have applied the wrong test in law because it appears to have ruled there should be no adverse inference as the prosecution case was not strong enough to call for an answer. However the Court had already ruled in its no case to answer ruling that the prosecution case did call for an answer (the fourth stage of the *Cowan* test). It did not consider the correct question (the fifth state of the *Cowan* test) as to whether an adverse inference should be drawn because Mr Wheeler's failure to give evidence could only sensibly be attributed to him having no answer, or none that would stand up to cross-examination.

71. However, I am not satisfied that it is a material error. Therefore, I would decline to exercise my discretion to remit the matter to the Magistrates Court pursuant to section 251 of the Criminal Procedure Ordinance. This is for two reasons.

72. First, because the Court implicitly accepted that the fifth stage of the test in *R v Cowan* [1996] QB 373 was not satisfied – it made no finding that Mr Wheeler's failure to give evidence could only sensibly be attributed to him having no answer, or none that would stand up to cross-examination. The Court impliedly found (and would have been entitled

to find) that Mr Wheeler had an answer that would have stood up to cross examination but chose not to give evidence because of the insufficiency of all the evidence to prove his guilt to the criminal standard either at the end of the prosecution case (before he could have given evidence) or by the conclusion of the case (and the further evidence presented by Mrs Wheeler could also be taken into account).

73. I accept that the trial ruling does not specifically refer to the fifth stage of the *Cowan* test: however, I am satisfied that a consideration of the full account provided by Mr Wheeler in interview (and which he provided orally, notwithstanding the prior recitation by his representative of a lengthy prepared statement) coupled with the minimal inconsistency between his account in interview and that evidence presented at trial means that the Court was entitled to reject (and must have rejected) the suggestion that the 'only sensible' explanation for his not having given evidence at trial is that he had no answer or none that would stand up to cross-examination.

74. Second, the Court was entitled to look at all the evidence in the round and decide that there was insufficient evidence to prove the case against Mr Wheeler, notwithstanding that there was a case to answer. That was the import of [26] of its ruling. I am satisfied that even if it had drawn an adverse inference against Mr Wheeler, the Court would still not have convicted him on the basis that the criminal standard of proof had not been satisfied.

75. The Court found that the prosecution case at its conclusion established that there was a case to answer but it effectively found that this alone did not establish guilt to the requisite criminal standard in order to convict. There were two different standards of proof or thresholds in play at the no case to answer stage and at the conclusion of the trial. Although the Court appears to have misworded this at paragraph 26 of the ruling, suggesting there was no case that called for an answer, I am satisfied that this was the effect of its ruling – that, taken as a whole, there was insufficient evidence to convict Mr Wheeler by the time he would have been called upon to give evidence or by the conclusion of all the evidence, so it was reasonable for him not to give evidence. What the Court meant to say is, 'we can draw no inference from Mr Wheeler not giving evidence, <u>because the evidence in the</u> case simply is not strong enough for us to do so'.

76. I dismiss this ground of appeal.

<u>Ground 4 - The refusal to allow the Crown to enter into evidence the entirety of Charles Wheeler's police interview, (specifically the comments he made after being cautioned when reported for the consideration of prosecution), was erroneous in law</u>

77. Mr Brown made the following submissions in support of the fourth ground of appeal.

78. By way of a section 10 admission, it was agreed that the transcript of Charles Wheeler's interview under caution was an accurate record of that interview. The prosecution relied on the audio recording of that interview at trial. Towards the end of that interview, the interviewing officer reported Charles Wheeler for the consideration of prosecution and issued him with the appropriate caution (page 9 of the transcript of interview).

79. The Court refused to admit into evidence anything further following that caution (from the officer's question: *"How has this made you feel?"* on page 9). The Court's basis for the exclusion of the additional evidence from that interview was that at the point that caution was issued, nothing further said by the defendant was admissible. Mr Brown submitted that this approach is wrong in law and the entire interview was in fact admissible.

80. Mr Wheeler was still under caution, and still participating in that police interview. The starting point is that anything said in that interview is admissible unless the appropriate application to exclude is made, and the caution does not cease to apply simply because the suspect has been reported for the consideration of prosecution. At the point a suspect is reported for the consideration of prosecution, they are again cautioned (akin to when being charged with an offence). Anything said by the accused thereafter is therefore admissible (indeed the caution specifically confirms that: *".... it may harm your defence if you do not mention <u>now</u> something which you later rely on in court...")*.

81. The Court excluded the remaining portion of Charles Wheeler's interview without legal basis and without applying or considering the appropriate provisions under section 67(1) of the PACE Ordinance 2003. Mr Brown therefore submitted that the decision was erroneous in law.

Discussion on Ground 4

82. I am satisfied that the Court did not err in law in excluding parts of Mr Wheeler's interview for the reasons that Mr Davis submits.

83. The comments in the portion of Mr Wheeler's interview that was not admitted in evidence were made in response to the question "how has this made you feel?" I am satisfied that they were not made, as Mr Brown submits, in response to the notification of reporting for consideration of prosecution.

84. The answer provided by Mr Wheeler to the question which followed the notification, 'is there anything that you wish to say that you haven't already told us which will disprove your involvement in this offence?' was a simple 'no.'

85. I am satisfied that the Court was entitled to decided that Mr Wheeler's feelings about the investigation were irrelevant to the matters in issue at trial and therefore inadmissible.

Further, the Court was entitled to decide that they should be excluded as being unfair to admit in evidence.

86. I dismiss this ground of appeal.

<u>Ground 5 - As Charles Wheeler did not give evidence, the decision to afford him the credibility limb of the good character direction was erroneous in law</u>

87. Mr Brown made the following submissions in support of the fifth ground of appeal.

88. The Magistrates' Court dealt with good character briefly at paragraph 8 of the ruling after trial, but did not direct itself specifically as to the credibility limb:

> "Both defendants are of good character. This of itself does not provide a defence. Both defendants are entitled to both limbs of the direction as although Mr Wheeler has not given evidence he is relying on his police interview."

89. As Charles Wheeler did not give evidence at the trial, Mr Brown submitted that he was not entitled to both limbs of the good character direction. In *<u>Vye [1993] 3 All ER 241</u>*, the Court of Appeal held that where a defendant does not give evidence on oath but relies on exculpatory statements or answers given to the police, the court should direct that consideration is given to the defendant's good character when considering the credibility of those statements.

90. Further, he submitted it would be appropriate for a court to make observations about the approach taken to such exculpatory statements in contrast to evidence given on oath. Simply put, the court must direct itself that a police interview is not evidence on oath, and that the Crown were unable to challenge by way of cross-examination the account given, and that must be taken into account when assessing credibility. The Magistrates' Court in this case simply adopted both limbs of the good character direction, without distinguishing the difference between exculpatory evidence and evidence on oath, nor the consequences of the defendant failing to give evidence. Mr Brown therefore submitted that the adopted approach was erroneous in law.

Discussion on Ground 5

91. I am satisfied that the Court did not err in law in applying the good character direction in the way it did to Mr Wheeler.

92. As Mr Davis submits, it is not the effect of the case of *Vye* [1993] 3 All ER 241 to disapply the credibility 'limb' of the good character direction when a Defendant declines to give evidence at trial: on the contrary, its effect is to require that the credibility of earlier remarks be considered in the light of the Defendant's good character

> 'In our judgment, when the defendant has not given evidence at trial but relies on exculpatory statements made to the police or others, the judge should direct the jury to have regard to the defendant's good character when considering the credibility of those statements. He will, of course, be entitled to make observations about the way the jury should approach such exculpatory statements in contrast to those given on oath….
> … Clearly, if a defendant of good character does not give evidence and has given no pre-trial answers or statements, no issue as to his credibility arises and a first limb direction is not required.' (Paragraph 12).

93. The Court has a direction to make observations contrasting the exculpatory statements made by the police to the police as opposed to exculpatory statements made on oath. However, as with the issue of adverse inferences in grounds 1 and 2, and the exclusion of evidence in grounds 3 and 4, the making of the observation regarding the different types of exculpatory statements is discretionary.

94. I accept Mr Davis' submission that had the Defendant not given answered questions in interview, it would have been erroneous to afford him the credibility limb of the good character direction. In fact, he provided a detailed account over the course of an interview of approximately a half hour's duration. The Court was therefore entitled in the exercise of its discretion to give Mr Wheeler the good character direction. It was a reasonable and rational exercise of discretion.

95. I dismiss this ground of appeal.

96. Grounds 1 to 5 have each been, ultimately, matters of judicial discretion, upon which the Magistrates' Court who heard the evidence at trial were best placed to adjudicate.

<u>Ground 6 - The Magistrates decision to rely on guidance provided in a Government press release issued in July 2021 when determining the issue of separation was erroneous in law</u>

97. Mr Brown made the following submissions in support of the sixth ground of appeal.

98. The legislation defines "isolation" as *"the separation of the person from any other person in such a manner as to prevent infection or contamination with coronavirus".* It was the prosecution's case that isolation had been breached as the Respondents had touched; they had remained at an unsafe distance from one another, and a bag had been passed from Charles Wheeler to Michele Wheeler.

99. Mr Brown submitted that the determination as to whether either Tespondent had breached isolation (i.e. failed to separate in a manner as to prevent infection or contamination) is a question of fact.

100. At paragraph 23-24 of the ruling after trial, the Court placed reliance on a July 2021 government press release when determining the issue of separation. He submitted that it was important to note that this press release was issued some six months before this incident took place; was not information provided to those in isolation, and was superseded by the information pack/letter provided to Charles Wheeler upon his entry into isolation (exhibit GEY/02 or 'the Quarantine pack").

101. Mr Brown submitted that the contents of GEY/02 are of relevance when considering the issue of separation and whilst not set out here in full, the following extracts are important to note:

a) Document headed "Quarantine Information for those staying at approved properties"

i. Page 5 under the heading "THE BOUNDARY - WHERE YOU CAN AND CAN'T GO" specifically sets out that those subject to isolation must remain within 2 meters from the curtilage of the property.

ii. Page 8 of that document talks about deliveries, and how they are to be facilitated. It sets out that family and friends are permitted to make deliveries. It reads: "Strict social distancing guidelines must be adhered to: the person making the delivery should not venture past the drop-off point. While deliveries are being made, residents should remain inside the property and adhere to the following guidelines:" If we turn over to page 8, it states: "residents must stay inside the property until the delivery has been made".

iii. Page 13 sets out further restrictions on visitors, and re-enforces the 2m social distancing rule. It states: "Please ensure that whilst outdoors you maintain distancing of 2 meters between you and others".

b) Document headed "Home Quarantine - Advice Sheet"

i. The bottom of page 1 is headed "What you should do during quarantine" which contains a list of 13 bullet points setting out various rules, including the social distancing requirement, and confirming that those in isolation must remain 2 meters from the isolation boundary of the property.

ii. Page 8 of that document, sets out a summary of the salient points, including again, the 2 meter social distancing requirement.

102. Mr Brown submitted that the Court placed undue weight on the information contained within the outdated government press release of 2021, essentially adopting the contents as expert evidence, despite it not being so.

103. He submitted that neither the provisions of Criminal Practice Rule 19 nor section 112 of the Criminal Procedure Ordinance 1975 were in play. It followed that the requirements

listed within that press release (which set out social distancing information) should not have been relied upon by the Court, nor should the Court have factored in the lack of measurements and distances, as it did so at paragraph 24 of its ruling:

> "We have no measurements as to the length or otherwise of the steps which would help us with distances. Mrs Yon gives an estimate of them being 1 metre apart. The guidance suggests the importance of face to face contact in the transmission of the virus if parties are only together for short periods of time."

104. Mr Brown therefore submitted that the decision of the Court to follow a government issued press release of July 2021 issued some six months before the incident took place, and which went against information provided to Charles Wheeler in the quarantine pack upon him entering isolation was erroneous in law.

Discussion on Ground 6

105. I am not satisfied there was any error of law in the Court taking into account the guidance from July 2021 in the way that it did. It did not rely on the July 2021 guidance as determinative of the test in law of sufficient separation in order to found the acquittal. It was not required to do so – it was not required to apply either the July 2021 guidance nor the quarantine pack guidance as constituting the strict test in law of what constituted a breach of isolation and necessary separation for the purposes of regulation 8(1)(a) Public Health (Prevention of Formidable Diseases) (Coronavirus No. 2) Regulations 2020. The Court was however entitled to take into account both sets of guidance and advice as it did when considering the question. However, it found that the advice was variable and inconsistent and therefore unclear.

106. The effect of the Court's ruling was that, in the absence of being able to make findings to the criminal standard as to the distance and time of the Respondents' contact and the variable guidance which was not binding as a matter of law, the Court was entitled to decide it was unable to come to a conclusion, let alone one beyond reasonable doubt, that Charles Wheeler had failed to isolate and breached isolation as required by regulation 8(1)(a). As a corollary, it was unable to make a finding that Michele Wheeler had assisted Charles Wheeler to breach isolation for the purposes of regulation 8(1)(c).

107. Its reasons were as follows:

[No case to answer ruling]

> 11.Turning to the problems of the definition provided for 'isolation.' The thrust of the definition revolves around the separation of one person from another. This separation must be in such a manner as to prevent infection or contamination with coronavirus. This court has not had the benefit of any evidence as to how this particular virus is transmitted. We are only too aware of advice given by SHG, and also by the UK government. The advice is prepared by the authorities, however it no doubt is based upon expert advice received. The expert advice is then distilled by the government into a simplified version for members of the public and is then released through the

press office. What we do not get is the original expert advice. It is also the case that the advice to the general public as to how the virus is spread has changed over time.

[Ruling after trial]

22.This leaves us with whether the two defendants were so close to one another that Mr Wheeler was not in isolation. The photograph was taken from an angle and we can't say how close they were from that. However Mrs Yon said that the two of them looked to be a metre apart and Miss Wheeler says they were 2 metres apart.

23.We have to rely upon the material before us to help us in deciding if Mr Wheeler was no longer in isolation, i.e. separate from Miss Wheeler in such a manner as to prevent infection or contamination with coronavirus. A government press release from July 2021 is in the bundle. This quotes Public Health England advising that transmission of the virus requires close contact with an infected person which it defines as:

iv. Face to face contact with someone less than a metre away;
v. Being within one metre for one minute or longer with face to face contact;
vi. Being within two metres of someone for more than 15 minutes.

24.We simply cannot make any findings as to how long Miss Wheeler was at the gate. We have no measurements as to the length or otherwise of the steps which would help us with distances. Mrs Yon gives an estimate of them being 1 metre apart. The guidance suggests the importance of face to face contact in the transmission of the virus if parties are only together for short periods of time.

25.In the no case to answer ruling we have already addressed the problems of guidance being relied upon to inform the court, the July 2021 guidance for example is different from the simple '2 metre rule' issued by the St Helena health authorities for those in isolation. This makes reliance upon the guidance documents we have seen problematic. Even if we could rely upon the July 2021 document to inform us the two defendants cannot be found to have fallen foul of it as we simply cannot be certain how close they got to one another or for how long.

108. The Court did not rely on a simple 2 metre rule as set out in the quarantine pack; nor did it rely upon the more detailed information contained within the earlier July 2021 document. It found that reliance on either document would be 'problematic' (Trial ruling, paragraph 25) because they were different (in fact, they were inconsistent) and because the guidance had 'changed over time' (No case to answer ruling, paragraph 11).

109. The import of the ruling was there was insufficient evidence on which to convict the Respondents even if it were based on the 2021 guidance but that the two sets of guidance were inconsistent in any event. Further, it accepted that any guidance did not constitute the test in law. There was no error of law in this approach.

110. Even if the '2 metre rule' contained in the subsequent guidance in the quarantine pack (GEY/02) was determinative of the test of separation under regulation 8(1)(a), which it is not, there would be no material error of law because the Court did not find it proved that

the Respondents had breached any 2 metre rule (nor did it find that they would have breached any ‘1 metre rule’).

111. In the absence of clear and unambiguous evidence as to what is required for the transmission of Coronavirus (beyond physical contact or the passing of items, of which the magistrates could not be sure there had been), the Court was not satisfied that it could make any finding to the criminal standard that there had been no necessary separation between the Respondents which was required in law to prevent contamination or infection with Coronavirus.

112. It found that it had not been proved to the criminal standard how close the Respondents were to each other or for how long. It did not find Mrs Yon’s evidence so compelling that the prosecution had proved that the Respondents were at any time less than 1 or 2 metres, apart (irrespective of how long this lasted). Earlier in its ruling (at paragraph 21) it found that the prosecution had not proved that the Respondents had touched. These were reasonable findings that were available to any properly instructed court on the evidence available to it.

113. The effect of the ruling was that even if the Court could rely on either set of guidance as constituting the test in law of sufficient separation, that the prosecution had not proved that the Respondents were insufficiently separated so as to breach isolation. That was a reasonable finding of fact open to the Court and sufficient to dispose of the case.

114. The determination of whether a person is sufficiently separated to be in isolation raises two questions: one of law, and one of fact:

i) What does it mean to separate from another person such as to prevent contamination or infection with Coronavirus?

ii) Did the accused remain so separate?

115. The first question is a matter of law; the second question is a matter of fact.

116. I am satisfied that the Court did not err materially in its interpretation and application of the law - ultimately, the question of whether the Respondents were sufficiently separated was a question of fact and degree. It did not find that there was sufficient evidence to prove that the Respondents touched nor that they were closer than 1 or 2 metres apart. In its no case to answer ruling, the Court accepted that the prosecution case (that the Respondents passed a bag and touched each other) would be sufficient to constitute the offence of breaching isolation for the purposes or regulation 8(1)(a).

117. Ultimately the Court did not lay down a strict or rigid test on what constitutes sufficient separation (separated in a manner as to prevent contamination of the virus) and necessary proximity to breach isolation for the purposes of regulation 8(1)(a). The import of its ruling is that the question of whether the Respondents were sufficiently separated was a matter of

fact and degree taking into account the two sets of guidance but not being bound by either. I agree with this approach. The legal test of sufficient separation under regulation 8(1)(a) is a matter of fact and degree based on the facts of any individual case (eg. the distance and time of any contact together with the surrounding conditions, extent of ventilation and protective clothing of individuals) while also taking into account (but not being bound by) relevant and current guidance on the issue as issued by Government and that given directly to those in isolation.

118. I also accept Mr Davis's submission that there was an inconsistency at the heart of the appeal that illustrates the interpretative and evidentiary complications that confronted the Court in its attempt to formulate clear justiciable standards for 'isolation' (separation from any other person in such a manner as to prevent contamination or infection with Coronavirus).

119. Mr Brown submitted in relation to Ground 6

'Page 13 sets out further restrictions on visitors, and re-enforces the 2m social distancing rule. It states: "Please ensure that whilst outdoors you maintain distancing of 2 metres between you and others.'

However, he then argued in Ground 8:

'The regulations do not mandate a 2 metre distancing rule and it is submitted that the court misdirected itself when placing reliance on that rule.'

120. The prosecution seeks to rely on a 2 metre rule when arguing that the Public Health England information (referred to in the trial ruling and half time ruling, variously, as 'the July 21 document' and 'the Public Health England guidance') ought not to have been considered when determining 'separation'. Nonetheless the prosecution disavowed any the same rule when it undermined the test proposed for deciding the question of 'isolation'. There needs to be sufficient clarity in the legal test on the question of 'separation' or 'isolation' when applying the standard of proof in criminal cases.

121. Isolation is defined in regulation 2(1) Public Health (Prevention of Formidable Diseases) (Coronavirus No. 2) Regulations 2020 as 'separation from any other person in such a manner as to prevent contamination or infection with Coronavirus', which is to say that isolation requires sufficient separation. A court cannot adopt divergent approaches to the two concepts of 'isolation' and 'separation'.

122. Advice, guidance, recommendation, instruction, and requests alone cannot provide an answer to the legal test of sufficient separation. That does not mean that the Court erred in law in taking into account the 2021 guidance when considering the test to be applied. In its ruling on the submission of no case to answer, the Court considered those matters which were within its knowledge or of which it could take judicial notice and those which were beyond their expertise. It took judicial notice of the fact that the advice and information presented to the Court (including that contained in the July 2021 document and the Quarantine advice sheets) had been distilled from expert scientific evidence, and in the

absence of such evidence in its raw form, it concluded that it could only rely on what was before them.

123. The Court was invited by the defence to attach greater weight to the July 2021 document on the basis that it, at least, made *factual assertions* as to what was required for the transmission of Coronavirus, and therefore offered a potential answer to question (i) posed above, thereby affording justiciable standards for the question of isolation. There was evidence at trial that the July 2021 document was more recent than the advice and guidance contained in the quarantine pack, which had first been issued in 2020.

124. The Court declined the invitation to attach greater weight to the July 2021 document. It did not, as is submitted, rely on or follow it: instead, it rehearsed an application of its standards in its ruling to illustrate the difficulties that would nonetheless remain were the Court able to rely upon it.

125. Given that the question is a factual one which pertains to the actus reus of the offence (and that there is no mens rea for the offence of which Mr Wheeler was accused), the fact that Mr Wheeler was issued with the quarantine pack after the publication of the July 2021 document is irrelevant.

126. In any event, the information sheet and advice sheet (in the quarantine pack GEY/)2) that the Attorney General sought to rely upon at trial to provide a definition for isolation were, as their titles suggest, advice documents. This is clear, too, from the contents of the documents: the passage quoted by Mr Brown in his submissions pertaining to boundaries occurs between paragraphs providing information on 'Bed Linen and Blankets' and one about 'Cleaning your Accommodation.' The list of 13 bullet points at page 1 of the advice sheet relied on by the Attorney General at Paragraph 33(b)(i) includes recommendations to 'wash your hands regularly for 20 seconds' and 'to avoid touching your mouth, nose, or eyes.' The guidance was just that. It could be taken into account in a prosecution but did not contain rules to be adhered to on pain of conviction – it comprised advice and information.

127. I dismiss this ground of appeal.

<u>Ground 7 - The determination that Michele Wheeler did not reach over the gate was one which no reasonable court, properly directing itself could have reached</u>

128. Mr Brown submitted that Magistrates' Court erred and made an unreasonable finding that Michelle Wheeler did not reach over the gate such as to base a finding that she entered the property and should be convicted of the offence under regulation 8(1)(e).

129. He submitted that the Court benefited from JC/01b and conceded upon determining the submission of no case to answer (paragraph 8) that: *"One photograph appears to show, on one interpretation, that Miss Wheeler is leaning over the gate which would be preparatory to opening it."* In her witness statement to the police (dated 25.1.22), Sylvia Yon confirmed that: *"[Michele Wheeler] came to the property and I observed her opening the gate, despite the gate being taped".* Ms Yon gave consistent evidence on oath, confirming that Michele Wheeler reached over the gate in order to open it. She also confirmed that at no point did Michele Wheeler drink from a bottle, or that she was holding a bottle or mobile phone.

130. Mr Brown submitted that when the regulations are applied and the evidence of Sylvia Yon together with JC/01b and objectively considered, the determination that Michele Wheeler did not reach over the gate (thereby entering the isolation boundary) was one which no reasonable court, properly directing itself in law, could have reached.

Discussion on Ground 7

131. The threshold for finding that the Court made a finding that no reasonable court properly directing itself could have reached is very high. The prosecution must establish that the factual finding of the Court was perverse, irrational or *Wednesbury* unreasonable – that the Court made a finding that was not within a reasonable range of findings available to a properly directed tribunal on the evidence before it. It is not a matter of this court deciding that it may have reached a different conclusion on the evidence.

132. I am not satisfied that this ground of appeal meets that high threshold

133. I am satisfied that, taking into account the entirety of the evidence at trial (and not only that of the prosecution case), with particular reference to the evidence alluded to at paragraph 20 of the trial ruling, it was open and reasonable for the Court to find that it could not be sure (satisfied beyond a reasonable doubt) that Michele Wheeler had opened the gate (thereby entering the property).

134. The Court's reasons were further supported at paragraphs 14-18 of its ruling after trial:

> 14. In cross-examination it became apparent that although she said in her statement she saw the grey bag passed she in fact did not. The distances in her statements were suggested by police officers and most concerning of all she signed a statement regarding what certain photographs depicted without actually having the photographs before her. It is also clear that at times her attention was distracted by her grandson. The upshot is that her evidence suffers from the problems of assumptions being made, her attention not being fully on what was occurring and her statements not reflecting the reality of what she saw.
>
> 15. A further problem arises from the photographs she produces. These were taken at distance and some details are unclear due to the use of a zoom lens. As already indicated one photograph which she says depicts a dog being passed

clearly showed no such thing. Of significant importance is that she says that the distance she observed the two defendants being apart from each other was one metre.

16. The defendants both gave interviews which we will not rehearse here but in essence they deny the offences and say that what is being observed in the photographs is in compliance with guidance issued.

17. Miss Wheeler gave evidence where she said a number of things. In relation to the gate she says she did not lean over it. She was possibly having a drink of water or using her phone but cannot be sure. She did not tell the police this as she felt she had said enough in her prepared statement and anyway she was not clear what she was being accused of. She says to open the gate one has to lean over it from the top step because the latch is some way down, she was not on the top step and was not leaning forward.

18. As far as photo 2 is concerned this is her and her son talking. They were 2 metres apart and she does not accept that her hand is outstretched to her son and nor is his outstretched to her. The dog was not being transferred then and she produced from the defence bundle 2 photographs that show the moment when the dog was released. She was clearly stood back and her son was opening the gate.

135. The Court gave sufficient and rational reasons for its decision at paragraph 14-18 and 20. It was entitled to decide that the eye-witness evidence of Miss Yon was not sufficiently reliable (taking into account similar types of factors that are considered in mistaken identity cases such as Turnbull) so as to convict Ms Wheeler to the requisite criminal standard. It also considered Miss Yon's evidence in light of the photographs and Ms Wheeler's contrary evidence that she did not lean over or open the gate.

136. I dismiss this ground of appeal.

Ground 8 - The determination that Michele Wheeler and Charles Wheeler were sufficiently far apart so as Charles Wheeler did not breach isolation was one which no reasonable court, properly directing itself could have reached

137. Mr Brown made a similar submission in relation to the Court's finding that the prosecution had not proved that the Respondents did breached isolation and were not sufficiently separated.

138. He submitted that JC/01a and JC/01b are self-evident. Taken in conjunction with the independent evidence of Sylvia Yon and the definition of "isolation" in the regulations, he submitted that the offences are made out. The court dismissed the photographs as (paragraph 22 of the ruling after trial):

"This leaves us with whether the two defendants were so close to one another that Mr Wheeler was not in isolation. The photograph was taken from an angle and we can't say

how close they were from that. However Mrs Yon said that the two of them looked to be a metre apart and Miss Wheeler says they were 2 metres apart."

139. Mr Brown submitted that the court's determination is not one which a reasonable court, properly directing itself in law, could have reached. The regulations do not mandate a 2 metre distancing rule and he submitted that the court misdirected itself when placing reliance on that rule.

140. The test is whether the pair were separated in a manner as to prevent contamination of the virus. That is a factual assessment to be made on the evidence. On the evidence of the photographs, and that of Sylvia Yon the pair touched and were not separated. On the evidence of Michele Wheeler, the pair were within close proximity of each other. As is seen in JC/01a, the Appellant respectfully submits that the conduct shown is not that which can be sensibly regarded as separation as set out in the regulations.

Discussion on Ground 8

141. I am not satisfied that the Appellant has established the high threshold required to demonstrate an error of law in the Court's finding of fact (as explained in ground 7).

142. I primarily rely on my reasons set out in Ground 6 for dismissing this ground of appeal (see for example, paragraph 112). I agree that the regulations do not mandate a 2 metre rule and the Court did not apply or place reliance upon the 2 metre guidance as constituting the test of sufficient separation for the purposes of regulation 8(1)(a). It did not apply a simple 2 metre rule – this ground betrays a misunderstanding of the approach of the Court in its ruling on the same evidence. I have already set out the appropriate test in law above and am satisfied that the Court applied the correct test in law and properly directed itself (see paragraphs 116-117 for example).

143. The Court was entitled to find as a matter of fact that the prosecution had not proved to the criminal standard that Mr Wheeler breached isolation. It made a reasonable finding that was open to it on the evidence available that it could not be sure that the Respondents were not sufficiently separated for the purposes of the regulations so as to prevent Covid contamination for the reasons it set out at paragraphs 22-27 of the ruling after trial.

Ground 9 - The Magistrates' Court erred when determining the issue of bail conditions

144. Mr Brown submitted that the Court erred in law in relation to bail.

145. On 21 February 2022 the police became aware that both Respondents were intending to leave the island. That prompted an application by the Crown for the imposition of bail conditions in respect of both Respondents, requiring them to remain on the island, and to surrender their passports.

146. Responding, the Chief Magistrate in his email at 14:10 on 21 February set out: *"If that is the case then the threat of bail conditions acts as an incentive to plead guilty which I want to avoid"*.

147. Mr Brown submitted that the Court applied the incorrect test as to the imposition of bail conditions. The test for bail conditions is contained within paragraph 93B of the Criminal Procedure Ordinance 1975. The test is whether there are substantial grounds to believe (in this case) that a defendant would fail to surrender to custody. Whether or not bail conditions act as an incentive to enter a guilty was not a relevant or a proper factor to be taken into consideration. The likely pleas, and the rational for such pleas, is entirely a matter for a defendant and their lawyer, and one not for the court. It is submitted that such a determination was erroneous in law.

Discussion on Ground 9

148. Ultimately, this ground of appeal is immaterial to whether there has been an error of law in the Respondents' acquittal and whether the Court erred in law in its verdict. It simply has no bearing on the question of the acquittals but constitutes an appeal against bail conditions rather than the ultimate issue before me.

149. Nonetheless, I am satisfied that the Chief Magistrate did not apply an erroneous legal test when considering the question of bail for the reasons that Mr Davis submits: he was not considering the matter of bail at the time the impugned remarks were made. I accept and adopt Mr Davis's submissions.

150. The remarks quoted from the email dated 21st February 2022 were made by the Chief Magistrate when determining an application for an adjournment.

151. The issue was when the first appearance would take place, and whether Ms Wheeler would be represented in person or via video-link (her representative, having recently arrived on St Helena, was due to remain in isolation until the day following the date originally set for the first appearance).

152. It had been proposed that the first appearance take place on Thursday 24th February 2022. This was objected to by the defence on the basis that, given the imperfect video-link connection on the island, the fact that it was Ms Wheeler's first hearing at a criminal court, and the fact that there had been considerable public and media interest in the case, it would be unfair to require Ms Wheeler to attend court and to enter a plea on a day on which her representative could not attend in person, without having had the opportunity for an in person conference beforehand.

153. It was understood by all parties that Ms Wheeler, having resigned her post, would seek *ultimately* to leave the island. However, it was equally understood that the Titan Airways flight which was due to depart the island on 9th March 2022 was, at the relevant time, the only realistic option available to Ms Wheeler and her son.

154. The defence had proposed an adjournment from Thursday 24th February 2022 to Thursday 3rd March 2022, on the basis that this would allow for Ms Wheeler to be represented in person *and* for the Attorney General to make his representations in respect of the necessity of bail conditions prior to the departure of the Titan Airways flight.

155. It was in this context, and not in the context of the application of the test for bail as such, that the Chief Magistrate proposed that the first appearance be adjourned *by one day* to Friday 25th February 2022, by which date Ms Wheeler's representative would have completed his ten days' quarantine and there would thereafter remain an eleven day 'window' for trial or sentencing, depending on the Defendants' pleas.

156. The Chief Magistrate approached the matter neutrally, foreseeing the possibility of not guilty pleas necessitating a trial and mindful that were the matter to be listed for first appearance shortly before the departure of the flight, matters extraneous to the proceedings might exert an unfair pressure on the Defendants to plead guilty were it not possible for a trial to be listed in advance of 9th March 2022.

157. In considering the issue of when the first appearance hearing should be listed, it was appropriate for the Chief Magistrate to have considered – as he did – matters touching on the interests of justice: he sought, as was proper, to remove any pressures to plead guilty that were extrinsic to the case itself, and might fairly have been criticised had he *not* done so.

158. In the event, the Attorney General served initial details of prosecution case and initial disclosure on 25th February 2022 and the defence did not demur when a trial date of Friday 4th March 2022 was proposed. Given the trial listing, the Attorney General withdrew its application for bail conditions. The Chief Magistrate released the Defendants on unconditional bail.

Conclusion

159. I am satisfied for all the reasons set out above that no material errors of law were made by the Magistrates' Court in acquitting the Respondents, that the Court directed itself without material error of law, and that the findings of fact made by the Court were reasonable ones that a properly instructed court was entitled to make on the evidence available.

160. The Court was entitled to find that there was reasonable doubt as to whether there had been entry into a location where a person was isolating and as to whether there had been a failure to separate in such a manner as to prevent contamination or infection with Coronavirus. It was entitled to find that the Respondents should be acquitted of all the offences charged.

161. In light of the above, I dismiss the Attorney General's appeal.

Chief Justice, Judge Rupert Jones

Dated: 16 June 2022