

JERSEY / JUDGMENT

A v AG [2012] JCA 104 (23 May 2012)

[2012] JCA 104

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Court of Appeal 23 May 2012 Before : The Hon. Michael Beloff, Q. C., President; Dame Heather Steel, D. B. E., and; Sir Hugh Bennett. A -v- The Attorney General Application for leave to appeal against conviction by the Royal Court on 8 th February, 2012 on one count of rape and one count of gross indecency. M. T. Jowitt, Esq., Crown Advocate. Advocate M. Preston for the Applicant.

JUDGMENT

steel ja: This is the judgment of the Court 1. On 8th February, 2012, in the Royal Court of Jersey, after trial before W. J. Bailhache Q. C. Deputy Bailiff and a jury, the appellant was convicted of offences of rape (Count 2) and gross indecency (Count 3) committed between 18th February, 1978, and 20th February, 1979, against his adopted daughter, B when she was aged 15 years. He was acquitted by the jury of an allegation of indecent assault upon his adopted daughter C between July 1977 and July 1979 when she was aged 16 or 17 (Count1). 2. The appellant seeks leave to appeal his convictions on the following two grounds, he did not pursue a third ground before us; (i) That the evidence relating to his internet searches for material relating to incest and underage sexual images of children ought to have been excluded from the trial as unfair; (ii) That the Deputy Bailiff mis-directed the jury in such a way as to alter where the burden of proof lay and reduce the standard thereof when he unfairly summarised how the jury should consider the complainants' evidence at the start of his summing up. He ought not to have inserted his own comment within this, that if the complainants were lying "this would have been a very wicked thing to do." We grant leave to appeal only in respect of ground one. Facts and Evidence 3. In June 1971 the appellant married D, a widow, whose husband had died in 1966. She was the mother of three children, C who was born on in 1961, B born in 1963 and E who was born in 1966. Shortly after his marriage the applicant adopted the three children who took his name. They lived at different addresses in England and in 1974 G was born to the appellant and his wife. In 1977 the family moved to Jersey and lived in a four bedroomed house where, until they left, the two girls occupied separate bedrooms and the appellant and his wife shared a bedroom. 4. In 1987 the appellant formed a relationship with F and there were periods of separation from his wife. In October 1988 D told the appellant to leave and they have not lived together since then. 5. F left her husband to go to live with the appellant and gave evidence that when they were about to move in together the appellant told her that "she ought to know that he had raped his step daughter." She was in the bath, it was at the time G was born and his wife was in hospital. He said he had drunk a bottle of whisky. F described the place and circumstances of that conversation and denied that that evidence was not true. She was shocked. She loved the appellant and felt everyone deserved

a second chance and they started living together. 6. F had been a nurse, and went back to the mainland where her husband died of motor neurone disease. At the invitation of the appellant she then returned to Jersey to help to run his company. She travelled to England, where she had a house, once a month, and whilst making a flight booking on the appellant's computer she discovered a password protected site 'pre-pubescent children.' She challenged the appellant. He replied "What I do in the privacy of my own home is my own business. Better that than going out and doing something." She confirmed in cross examination that her evidence in each respect was true. She said she had worked with children who were abused and she could not live with the fact that he had been looking at child pornography. She denied any pre trial contact with either of the two complainants. 7. She reported the matter to the police and submitted the computer for examination. She also disclosed that the appellant had made admissions to her about raping his step-daughter. The two complainants were traced and made witness statements. Two computers were examined and one, an HP-Compaq Desktop, was found to have search terms input by a user such as 'pre teen abused' and 'pre teen pussy'. This computer also contained evidence of the user searching on the internet and finding pornographic stories associated with incest and including sexual activities of fictional persons under the age of 16 years. That computer had one user account in the name of A and it was password protected. The recovered internet history showed extensive use of the internet to visit pornographic websites. There was a predominance of references to teens and incest. The other computer showed similar internet activity: searching for incest stories was apparent. 8. On 15th March, 2011, the appellant was interviewed under caution about the allegation of indecent material on his computer. In the course of that interview he admitted having accessed the sites. He also admitted accessing incest stories online, but said that he was not interested in underage sex. He had only ever intentionally accessed images of girls aged 18 or over. 9. On 14th June, 2011, he was interviewed under caution about the allegations made by C and B and exercised his right to make no comment. 10. C gave evidence that on the night her brother E was born she was raped by the appellant. They were living in England he had been out drinking and smelled of whisky. He asked her to keep him company in his bed and raped her. She felt the pain, "felt his penis go inside," she said "it was nothing she'd ever felt before." She said "I just thought that's what dads do". In cross examination she added that she had never had a proper relationship with a dad. The next day he called her into the living room and said "you know what happened last night was wrong and that if you ever said anything I'd kill you" and I'd never said anything. The jury, were told in opening, that as that alleged matter happened in England, as a result the appellant cannot be tried by a Court in Jersey and that was the reason there was no count to cover that allegation in the indictment. 11. In evidence, C told the jury of a sexual assault by the appellant on her in Jersey when she was 16 or 17 (Count 1). She was getting out of the bath and the appellant put his hands between her legs. She just froze and told no-one, because she could still remember him telling her that he would kill her if she ever said anything and she took that to remain the position. In cross examination she was asked about problems with her relationship with the appellant and it was put to her that he did not sexually abuse her at all, either in England or in Jersey. She replied "Oh sorry, he did. I wouldn't be here saying it and I wouldn't lie". She denied any contact with F and said she only knew her name two weeks previously and had not seen her until the morning of the trial. 12. The evidence of B

described an incident when she was 15 and alone in the house. The appellant came into her room, which was "not something which ever happened." He was naked. She knew something was wrong and as he came towards her she started to shout "what are you do-" and he put his hands over her face and told her to be quiet. She was then taken to her mum's room, the room which her mum shared with the appellant, where he raped her. She said he forced himself on her, she couldn't do anything to stop him. She was too frightened. He entered her forcibly with his penis. She was lying on her back and he smelled of whisky. He seemed controlled, he knew what he was doing and said "don't try screaming, no-one is going to hear you and if you tell anyone I will kill you." She said she was petrified, numb, she didn't know what to do. After he tried to enter her there he forced himself into her mouth. She asked if she could go to the toilet and he said just do it there. 13. In cross examination she confirmed that she was alone, she conceded that she was obviously wrong that her mother was away at the funeral of C and B's grandmother. Her mother was not in the house and the reasons why she was away "maybe have become confused in her memory." B said that the appellant came into her room a second time when her mother was away to ask for an alarm clock and nothing happened and maybe that was why she was confused as to the reason her mother was absent. She said it was in 1978 when she was 15 that he "did this to me." She denied any contact with F saying that she had never spoken to or seen her and there had been no Facebook or telephone contact. She had left home when the appellant went to live with F and had never spoken to or seen her. When it was put to the witness that the allegations were not true she replied "They are, every word is true, every word". 14. The appellant did not give evidence and none was called on his behalf. Ground One That the evidence relating to the internet searches for material relating to incest and underage sexual images of children ought to have been excluded from the trial as being unfair. 15. On 16th January, 2012, W. J. Bailhache, Q. C. Deputy Bailiff, as single judge, considered and rejected applications by Advocate Preston for the exclusion of parts of the evidence. These included an application concerning:- (i) evidence found on the appellant's computers of searches having been made on a number of dates in 2008 and 2011, for pornographic stories associated with incest and fictional persons under the age of 16; (ii) evidence of searches under 'preteen abused' and 'preteen pussy'; (iii) evidence of 71 indecent pictures of children which had been deleted; and (iv) evidence of searches for incest stories and pictures (not of children) depicting an incest theme, and linked evidence of an alleged confession to F, his former partner that he had accessed child pornography. 16. The relevant paragraphs from the Deputy Bailiff's judgment are 19-26 which can be taken as read into this judgment. He ruled that the computer evidence and the related evidence of the defendant's confession to his former partner that he had viewed the child pornography was admissible. 17. Before us Advocate Preston made essentially the same submissions as he made to the Deputy Bailiff:- (i) That the computer evidence went to propensity only and was inadmissible as irrelevant, alternatively that its prejudice far outweighed its probative value given that, firstly the appellant's interest in pornography was only established at a time thirty years after the alleged offences, secondly that incest was not the only subject of the pornography accessed, thirdly that incest was not itself sufficiently distinctive to create the necessary link to the offences. He added that while the Deputy Bailiff found the evidence admissible as relevant he did not carry out the exercise then required to determine whether the probative force outweighed its prejudicial effect. 18. Advocate

Jowitt, for the Crown, made essentially the same submissions to the Court of Appeal as he made to the Deputy Bailiff:- (i) That the evidence was admissible on two grounds, firstly to rebut either an allegation of fabrication or false recollection and to the issue of credibility and secondly as an essential part of the narrative of events, explaining why the complaints were made so many years after the alleged offences. He also argued that the Deputy Bailiff had, if not expressly, in fact addressed the probative/prejudicial question. 19. The computer material before the Deputy Bailiff was in the form of Mr Perchard's forensic examination report and schedules. Mr Perchard was the Forensic Officer who examined the material. These indicated the level of interest in paedophilic incest and general paedophilia, and the regularity with which it was accessed. 20. The Crown's submission developed under the first head was that the volume and nature of the material and searches was more than sufficient to demonstrate a clear interest in sexual acts between father and daughter. Advocate Jowitt submitted that there were four features of the material which rendered it distinguishable from the general material before the court in AG-v-Facchino

[2008] JLR 103 :- (i) incest (ii) forced incest (iii) incest with teenage girls (iv) stepdaughters. This was clearly directly relevant to the offences alleged and was not to be discounted as merely demonstrating propensity. 21. The Crown submitted that the presence of evidence relating to paedophilic incest pornography on the appellant's computers was accordingly admissible on each of the following grounds:- (i) To rebut the defence of fabrication by the complainants on the basis that that it would be beyond coincidence that two women could independently make false allegations of incestuous child sex abuse against the appellant who, unbeknown to them, did in fact have an active interest in the very type of conduct that they had falsely alleged against him. (ii) To rebut the defence of fabrication by the former partner of the appellant's confession to rape, because it confirmed the accuracy of her evidence in another material respect, namely that the appellant's computers had been used to access paedophilic pornography. (iii) To corroborate the confession to the former partner that he had access to child pornography in that it is evidence that the appellant does have an interest in the type of conduct which he admitted to her by his confession to rape. (iv) To establish a continuing and active interest in the conduct of which the appellant is independently accused. 22. The Crown submitted that there was a further basis on which this evidence was necessarily admissible. Namely, to ensure that the jury are not to be left with a partial picture and to rebut a foreseeable defence that the complainants have made false complaints for improper motives which would be unfair to both them and the prosecution. 23. The evidence was required so as to explain to the jury how it was that each complainant came to make their complaints. They did not take the initiative. It was the discovery of the child pornography on the computer which led F to the police. As a consequence she also told the police about the confession to rape. It was this which led the police to trace the appellant's adopted daughters, which in turn led them to make witness statements. 24. The jury were entitled to know the circumstances in which the complainants were approached and to make their complaints, otherwise, at best they would have no explanation for why, after so many years of silence, these

complainants suddenly decided to make these allegations; and at worst they might be misled by defence suggestions of improper motives which were left uncorrected. 25. The Deputy Bailiff rejected the appellant's submissions, ruled that the evidence was admissible, and gave his reasons in the written judgment, but he indicated that it was open to the defence to renew the objections to the admissibility of evidence depending on the evidence given at trial. 26. Advocate Preston submitted to the Court of Appeal that this ruling was wrong and that the evidence should have been excluded as unfair. 27. No further application, either before or during trial, was made in relation to the admissibility of this evidence and the Crown proposed to place Mr Perchard's findings before the Court with reference to the detailed schedules of the material considered pre trial by the Deputy Bailiff. At trial, by agreement, the evidence of Mr Perchard was summarised and read to the jury in the terms set out in paragraph 7 above. 28. The jury were told by the Crown in opening the trial about the type of material found on the appellant's computer and five examples were quoted by title. It was submitted to the Court of Appeal by Advocate Preston that as the full evidence of what was searched for by the appellant, and described in detailed and dramatic terms, did not in fact go before the jury, this in itself created unfair prejudice. Advocate Jowitt said to the jury:- "Well what is the relevance of the computer pornography because [A] is categorically not on trial for that. Can I make this clear straightaway, please bear this well in mind throughout this case, the Crown do not say, oh well look at what he's been looking at on the internet, you don't need to worry any more, if he looks at stuff like that, then obviously he must have sexually abused his daughters. We don't say that because it would be quite wrong to invite you to reason in that way and it would be quite wrong because someone the fact that someone passively views something on his computer doesn't mean, does it, that he will go on and do those things in himself in real life? Can I illustrate by way of what I hope is a helpful example " He went on to give an example of "why we don't say and you mustn't say, oh well, because he looks at child pornography and incest online therefore he's guilty. That would be unfair to him. But that evidence is relevant in this case and it's relevant in this way. We anticipate that it may be suggested by the Defence in this case that [C and B] were never sexually abused at all but either they have made the whole thing up or for some reason their memories have played tricks on them into imagining things which never happened. If that is the suggestion made, then we suggest that that you will want to consider whether it is even remotely probable that two women could independently falsely accuse this defendant of the paedophilic and incestuous abuse of them when they were juveniles, falsely, when unknown to them he does in fact have an interest in just that kind of sexual behaviour you may think is simply beyond coincidence.---Computer evidence rebuts, deals with, answers any suggestion that [C and B] are lying or mistaken because the similarity between what they allege he did to them and what the computer evidence says about his sexual interests cannot in common sense be explained away as coincidence," 29. In summing up the Deputy Bailiff directed the jury, as he had properly indicated that he would, that the computer evidence was not to be used as demonstrating any propensity or any leaning on the part of the defendant to commit these offences or offences of this kind.

He referred to the Crown opening, which we have cited, and went on to say:- "The dangers of looking at this evidence from a propensity perspective become even more obvious when you recognise that the alleged offending took place in the 1970s and the alleged pornographic viewing between 2009 and 2011. So the interest in pornographic material may not have existed at all when the alleged offending took place. Put another way, an interest in 2009 cannot of itself support offending alleged in respect of activity 30 years earlier. It is however put before you as relevant only on this basis. Is it at all probable that if these two complainants were in fact fabricating their complaints, inventing them, which is the main defence put before you, the defendant should have an interest in exactly the same sort of pornography as is reflected in these offences. That is to say pornography related to incestuous relationships and father, daughter sexual encounters. Now the Crown say it's clear that there is no reason why the complainants should have thought that he had such an interest because they were not aware of F's evidence. So the Crown say that it is beyond coincidence that such a fabrication could sit alongside such an interest and that you can therefore be sure that there was no fabrication. Well, that is entirely a matter for you to assess. To accept or reject as you wish. The important direction that I must give you is that this is the only relevance of this part of the evidence." The Law 30. In paragraph 22 of his judgment the Deputy Bailiff wrote that he approached the submissions on the basis that there were two questions to consider. The first is whether the evidence is relevant to any of the counts in the indictment. If it is not relevant nor is not admissible. The second is whether, even if it be relevant, the evidence is more prejudicial than it is probative, and/or that it would be unfair to the defendant within the scope of Article 76 of Police Procedures and Criminal Evidence (Jersey) Law 2003 to allow the evidence to be admitted. 31. This was clearly the correct test. See Henriques J at paragraph 21 of the judgment in R-v-David John R (R) 25th May, 2000, Case No 99/05451/W5, which predates the English Criminal Justice Act 2003, and sets out the propositions summarising the then existing state of English law, (and which reflects the situation which currently exists in Jersey) and we accept that we should apply this test to the material before us:- (i) where evidence is tendered solely to establish propensity to commit a crime it is not admissible; (ii) where the evidence achieves or is capable of achieving more i.e. repetitive situations or highly unlikely coincidences then it becomes relevant and admissible; (iii) there is a balancing exercise required of the judge - is the probative force in support of the allegation sufficiently great to make it just to admit the evidence. 32. In support of his submission that the evidence should be excluded, Advocate Preston cited the case of AG-v-Facchino

[2008] JLR 103 as being directly comparable with this case. 33. In paragraphs 25 and 26 of his judgment dealing with the exclusion applications, the Deputy Bailiff distinguished the case of Facchino, where the Court found that the evidence related only to propensity and not to the offences actually charged. He accepted the Crown submission that since the appellant denied the offences he must necessarily be asserting impliedly if not expressly, that the two complainants had fabricated their stories, either together or separately. 34.

There is copious authority on the circumstances in which a person's interest in pornography in either written material or (more commonly nowadays) electronic material can be adduced in a case where sexual offences are alleged. 35. In *Facchino* the Commissioner considered the case of *R-v-Gray*

[2002] EWCA Crim 1047 in reaching his decision. Here material found in the possession of the defendant was found to be capable of helping the jury to decide whether or not the complainant was telling the truth and accordingly went to an issue in the case. It was not evidence which was admitted for the purpose of propensity and the jury were so directed. The evidence was admitted because of the link between the material found in the defendant's home and the material allegedly used by the defendant in the hotel room. Paragraph 12 of the judgment of Latham LJ reads:- "The issue before the jury, as we have identified it from the judge's summing up, was one in which the jury was required to come to a conclusion about the credibility of the account given by the complainant on the one hand and the appellant on the other. It seems to us that in determining that issue it was relevant to the jury's considerations that pornographic material of a type similar to the material found in the possession of this appellant was used according to the complainant to stimulate sexual activity and that he was given a sexual aid which was similar to a sexual aid found in the possession of the appellant. This was material which was capable of helping the jury to decide whether or not the complainant was telling the truth about what the complainant did in the hotel room that day. In our judgment it accordingly went to an issue in the case. It was not evidence that was admitted simply for the purposes of establishing propensity; and the jury were directed in forceful terms by the judge not to allow themselves to use the material merely as evidence of propensity. Given that it was, in our judgment, admissible, it seems to us that the way the material was handled-----was such as to justify the judge in concluding that it was proper, in the exercise of his discretion, to permit it to go before the jury as being of sufficient probative value to outweigh the prejudicial effect that undoubtedly such material would have had." 36. In the present case the Crown submit that the link between the computer evidence and the evidence of the two complainants exists from the similarities in nature and regularity of the incest searches which includes teenage rape, forced incest and 'stepdaughters' and the nature of the two independent complaints. 37. We are satisfied that the Deputy Bailiff was correct to distinguish *Facchino* from this case. In the particular circumstances of this case, evidence linking the extent and nature of the computer material to the complainants' independent evidence is relevant to the only issue in the case i.e. did the incidents take place, and to the credibility of the complainants. 38. As in *Facchino* the Court was referred to *R-v-Wright*

[1990] 90 Cr. App. R. 325 and the judgment of Mustill LJ who referred to the principles set out in the opinion of Lord Herschell LC in *Makin-v-Att Gen* for New South Wales

[1894] AC 65:- "It is undoubtedly not competent for the prosecution to adduce evidence tending to shew that the accused has been guilty of other criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried. On the other hand the mere fact that the evidence adduced tends to show the commission of other crimes does not render it inadmissible if it be relevant to an issue before the jury, and it may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental or to rebut a defence which would otherwise be open to the accused. The statement of these principles is easy, but it is obvious that it may often be very difficult to draw the line and to decide whether a particular piece of evidence is on the one side or the other." Lord Mustill made it clear that the principle was subject to exceptions which are well established he said it was quite clear that they were not brought into play simply through a denial that the acts in question ever happened at all. 39. The editors of Archbold Criminal Pleading Evidence and Practice para 13-22 at 1299 (2002 ed) and at 13-62 ,p1498 of the 2012 edition, submit that there should be no different principle where the nature of the defence is a complete denial (although the application thereof may lead to a different result):- "The assertion that the same principle applies to all cases regardless of the nature of the defence is not to assert that the application of the principle will lead to the same conclusion in all such cases. The probative value of the disputed evidence has to be assessed in the light of all the evidence and the issues in the case; to be admissible it has to be so cogent that if added to all the other evidence, only an ultra cautious jury would acquit in the face of it. If a complainant makes an allegation of a sexual offence against a person previously unknown to him, and the defence is one of complete denial, it is submitted that evidence of the finding in the accused's possession of a magazine depicting the commission of acts of exactly the same type as those alleged would be admissible. What are the chances of the complainants making an allegation of a serious sexual offence against a complete stranger, and that person turning out to have an interest in exactly the type of conduct of which he is accused? The practical application of the principle is unlikely ever to be so straightforward. In the majority of cases, the allegation is against someone (headmaster, scout leader, swimming instructor, etc.) who was known to the accuser, and the judge will no doubt bear in mind that if a false accusation is to be made, it is perhaps more likely to be made against a person known (or believed) to have a homosexual or paedophilic propensity; if the accused has been picked on for this reason, there would, of course, be no coincidence factor at all in the discovery of incriminating magazines or articles in his possession (aliter, of course if the items were referable to the particular allegation)." We respectfully agree with the analysis in Archbold . In the present case it was submitted by the Crown that the two complainants in this case were effectively now strangers to the appellant and should be so regarded. 40. Advocate Jowitt cited DPP-v-P

[1991] 2 AC 447 and the judgment of Lord Mackay LC at page 10, referring to Reg-v-Boardman

- (1975) AC 421 H. L. 9:- "From all that was said by the House in *Reg v Boardman* I would deduce the essential feature of evidence which is to be admitted is that its probative force in support of an allegation that an accused person committed a crime is sufficiently great to make it just to admit the evidence, notwithstanding that it is prejudicial to the accused in tending to show that he was guilty of another crime. -----Once the principle is recognised, that what has to be assessed is the probative force of the evidence in question, the infinite variety of circumstances in which the question arises, demonstrates that there is no single manner in which this can be achieved. Whether the evidence has sufficient probative value to outweigh its prejudicial effect must in each case must be a question of degree." 41. As to the submission that the Deputy Bailiff, having ruled the evidence admissible, did not specifically address the question of prejudice, we reject this and refer back to his judgment. In his direction to the jury in his summing up, as quoted above, regarding the computer evidence it was made abundantly clear that the evidence was not relevant to propensity, but only as he directed. From this it is plain that he had well in mind the balance between probative/prejudicial evidence. We cannot fault his assessment of where that balance lay. 42. The prosecution submission to the Deputy Bailiff was also (as we have noted) that the computer evidence, its discovery and the applicant's response to F was an essential part of the narrative. The discovery of the computer evidence led F to the police. F told the police of the applicant's confession to rape. That explained how the complainants were traced and came to make their statements. Such explanatory evidence has always been admissible see *Purchas LJ in Pettman* 2nd May 1988 unreported (5048/C/82):- "Where it is necessary to place before the jury evidence of part of a continual background of history relevant to the offence charged in the indictment and without the totality of which the account placed before the jury would be incomplete and incomprehensible, then the fact that the whole account involves including evidence establishing the commission of an offence with which the accused is not charged is not of itself a ground for excluding evidence". See also Archbold 2012 edition p1486, 13-30 re the old common law rule that permitted such evidence, and the recent case of *U-v-AG*
- [2012] JCA 085 re the admissibility of background evidence and which, although not cited in argument, confirms our view. 43. We received written submissions, which we invited, on this aspect of the appeal, from Advocate Preston. He contends that it would have been sufficient for the jury to be told as the Deputy Bailiff indicated "While interestingly you get there if you simply say that the investigation started because a complaint had been made to the police which was investigated and led to this further investigation." In our judgment, if this course had been followed, there could have been a real danger that the jury would speculate as to how the complaints arose so impairing the fairness of the trial which is the right of the prosecution as well as the defence.

Conclusion

44. We were invited to conclude that the Deputy Bailiff's ruling was wrong, that the evidence should not have been admitted and that the convictions should be set aside. 45. We do not conclude that the Deputy Bailiff was wrong in his decisions to admit the evidence. He correctly assessed that the probative value of the computer evidence and the appellant's response when challenged by F about the 'title' of the site she had discovered on the computer, was evidence capable of rebutting a defence of fabrication and was relevant to an issue in the case. He then correctly performed the balancing act required in the exercise of his discretion and his decision not to exclude the evidence. 46. Further, we are satisfied that, in fairness to the prosecution, the evidence is an essential part of the narrative for the jury to consider the history of how the complaints came to be made. The fact that the jury acquitted the applicant of Count 1 clearly establishes that the appellant suffered no actual prejudice from the inclusion of the evidence the subject of this application and that the directions given by the Deputy Bailiff as to how the evidence should be regarded were scrupulously followed. 47. Although this ground is arguable and we grant leave to appeal, the Deputy Bailiff's ruling on whatever basis cannot be faulted and for the reasons given we dismiss the appeal. Ground Two That the Judge mis-directed the jury in such a way as to alter where the burden of proof lay and reduce the standard thereof 48. The applicant submits that the Deputy Bailiff unfairly summarised how the jury should consider the evidence at the start of his summing up by stating that the jury should decide whether the complainants were lying. He ought not to have inserted his own comment within this, that if the complainants were lying "this would have been a very wicked thing to do". 49. On the evidence before the jury there was only one issue in the case. The jury had to consider whether each or either of the complainants was truthful and accurate. The applicant had given no evidence nor called any, he made no comment in interview and as the jury were correctly told there was no evidence from the defence to undermine, contradict or explain the evidence from the complainants. 50. At the start of his summing up the Deputy Bailiff did no more than cast for the jury in simple terms the real issue at the heart of the case. He used the words:- "did the two complainants prepare fabricated complaints of rape and other sexual abuse at the hands of their adopted father, the defendant, allegedly taking place many years ago in the late 1970s whether out of revenge for his unkindness to them while they were growing up or for some other reason. Did they do so together so that their stories would be mutually supportive? By any standards this would be a wicked thing to do. Or is the defendant guilty of taking advantage of his position as their adoptive father while he had the opportunity in the house where they lived in order to assault [C] indecently and rape and commit an offence of gross indecency on [B]? Well these are the main questions which confront you in this case and the law lays down some rules as to how you are to determine them which I must now tell you." 51. The Deputy Bailiff then gave a full and careful direction on the burden and standard of proof, which it is unnecessary to recite, but which had already been fully rehearsed by the Crown in opening and the defence advocate in his final speech, and the jury returned verdicts of guilty in respect of counts 2 and 3 and not guilty in

respect of count 1. This is the clearest possible indication of the fact that the jury followed the direction with extreme care and that the summing up was neither unfair nor misleading. 52. We accept that a judge has a duty to state matters "impartially, clearly and logically, and not inappropriately to inflate evidence to sarcastic or inappropriate comment" . The Deputy Bailiff here did no more than set out the issue and relate his comment to the suggested defence that the matters alleged had not taken place. Hence his approach cannot be faulted. 53. This ground is not arguable and leave to appeal is refused. Authorities AG-v-Facchino

[2008] JLR 103 . Police Procedures and Criminal Evidence (Jersey) Law 2003. R-v-David John R 25th May 2000, Case No 99/05451/W5. Criminal Justice Act 2003. R-v-Gray [2002] EWCA Crim 1047. R-v-Wright [1990] 90 Cr. App. R. 325. Makin-v-Att Gen for New South Wales

[1894] AC 65. Archbold Criminal Pleading Evidence and Practice 2002. Archbold Criminal Pleading Evidence and Practice 2012. DPP-v-P [1991] 2 AC 447. Reg-v-Boardman (1975) AC 421 H. L. 9. Pettman 2nd May 1988 unreported (5048/C/82). U-v-AG

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