

JERSEY / JUDGMENT

# E -v- AG [2018] JRC 111 (27 June 2018)

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## judgment

the bailiff:

### Introduction

1. The Appellant was convicted before the Youth Court (Relief Magistrate Mr Le Cornu , Mr Martin and Mrs Peters) of one charge of indecent assault, and acquitted of a further charge. Both charges related to alleged incidents which occurred in 2017, at the residential children's home where the Appellant, then aged 15, resided. Both complainants were care workers at that home. The first complainant alleged that the Appellant hugged her and in doing so he reached down and squeezed her bottom. The first complainant said that she had had conversations with the Appellant about inappropriate behaviour of that kind, and she felt offended that he had done it. The issue was not the hug, which happened not infrequently, but the grabbing of her bottom. This was alleged to have taken place in the afternoon or early evening as she was preparing or had prepared dinner. 2. At about 11 o'clock, the second complainant was leaving the property at the end of her shift. She and the Appellant knew each other well, and as she left, the Appellant was alleged to have approached her from behind. She felt his left arm coming up around her neck and the right hand came round and grabbed her left breast. She told him not to be silly and he released the breast although he continued to hold her in the headlock. He then gave her a very hard push on her back which made her topple forward, and she had to put out her hands to steady herself from falling. 3. There were no independent witnesses to the allegation of the first indecent assault. There was an independent witness to the second assault, who corroborated what the complainant in relation to that case said. 4. The second complainant made her complaint to the police approximately three days later. The first complainant made her complaint three or four days after that. The Appellant was arrested after the second complainant had made her statement and taken to Police Headquarters. He was charged with common assault on the second complainant, although subsequently charges of indecent assault were brought in respect of both incidents. 5. In the reasons given by the Youth Court for its decisions, the Court said that in relation to the first complainant, it was clear from the evidence that the Appellant was used to being hugged or giving hugs to members of staff. Although in his evidence, the Appellant denied being present at all, the

Youth Court found that he had hugged the first complainant, and that although he had pinched her bottom, the Court did not consider that this was done in an angry, revengeful, rude, insolent or hostile manner and accordingly, applying the test in *AG v Vaughan* (unreported Royal Court November 1974) the Court acquitted the Appellant of that charge. 6. In relation to the second charge, the Court regarded that as a serious offence. The placing of the second complainant in a headlock was an aggressive act, and the grabbing of the breast was a rude and hostile assault to which the second complainant did not consent, as the Appellant would have known. Accordingly the Court expressed itself satisfied that the Appellant was guilty of an indecent assault upon the second complainant. 7. The Appellant now appeals to this Court against his conviction on the following grounds:- (i) The prosecution failed to provide full disclosure to the defence before trial, in particular failing to disclose residential logs and other records from the relevant children's home. (ii) The Youth Court's decision to join together the two charges of indecent assault to be heard in one trial was unduly prejudicial to the Appellant. (iii) The decision of the Youth Court to convict in respect of the allegation of the second complainant was not one which the Youth Court could reasonably have reached. 8. We turn now to those grounds of appeal. Disclosure 9. From 21 st February until trial the Appellant's counsel were requesting disclosure from the prosecution, and by trial were contending that the disclosure was inadequate. It was assumed that as the Appellant was in a residential children's home, there were bound to be documents and records completed by the residential children's home staff in relation to the events which were the subject of the charges. Time and again, counsel for the prosecution (not Advocate Gollop) asserted that complete disclosure had been made. However, by an email of 6 th March at 08:49, the prosecution advocate said this:- "With reference to your request on 21 st February. My point is that what you seek is third party disclosure which is not in the possession of the prosecution. Some of this information may be covered by Rule 25 of the Children (Jersey) Rules 2005. If you seek to claim there is contamination of the witnesses then this can be put to them in cross-examination but if you are not satisfied that that approach [sic] then it will be necessary for the prosecution to:

- (a) Establish what information is held by HSSD;
- (b) Establish whether HSSD will consent to the disclosure, and
- (c) If HSSD consent, an application will need to be made to the Royal Court for disclosure of any material which is before them." 10. At trial the complainants were asked about documentation which they completed in the course of their employment at the residential children's home. It was clear from what they said that there were Datix records, Mosaic system records and hand-written and electronic logs in respect of all incidents which took place at the residential children's home. None of these were disclosed to the defence at the time. In addition, the police took a statement from a manager at the residential children's home, who had apparently discussed with at least one of the complainants the events which took place. This statement has still not been disclosed, although the note of the discussion has. 11. The test which the prosecution applied in the weeks leading up to the trial before

the Youth Court was whether the material in question undermined or contradicted the prosecution's case or in any way assisted or might assist the defence. In his contentions before us, Advocate Gollop accepts that the prosecution's duty of disclosure extends to relevant material held by third parties, and in such circumstances the obligation of the prosecution is to pursue reasonable lines of enquiry in relation to such material and if that material meets the general test in that it tends to or may tend to undermine the prosecution or does or may assist the defence's case, then such material should be disclosed. 12.

Advocate Gollop has contended that the prosecution made a full and proper assessment of all material in the prosecution's control or possession and applied the relevant test, making disclosure as appropriate. He also contends that in terms of relevant material held by third parties, the prosecutor undertook all reasonable lines of enquiry to ascertain what material was held by third parties, and having identified that material, fully and properly applied the disclosure test. However, Advocate Gollop has undertaken a fresh review of the material held by third parties, and considered that there was one document which was disclosable given the way in which the Appellant's case developed at trial. When interviewed by the police under caution, the Appellant had said that the indecent assaults did not happen and suggested that the witnesses were lying. When he came to give evidence, the Appellant said that he was not present at the children's home at the relevant time. Thus Advocate Gollop submitted that a document headed " Residential daily notes ", which recorded the Appellant as present in the home at the relevant time, should have been disclosed, and he did so for the purposes of this appeal. The document contains four columns, three of which seem to be particularly relevant - date and time, details, and the worker's name. There was no oral evidence on the document, because it has only just emerged, but a reasonable assumption is that the date and time and details columns are generated by the worker whose name appears under that column. 13. Advocate Bell contends there is other material which ought to have been disclosed. The particular requests are for the key worker notes and the Datix reports. These have still not been disclosed. 14. The Attorney General's guidelines for police and prosecutors were issued on 1 st August, 2006, and they have the support of this Court with one qualification in relation to third party disclosure. The guidelines on third party disclosures say this:- "Third party disclosure It is NOT the prosecutor's duty to consider whether material may exist in the possession of the third parties which may afford some support to the defence. Whilst it is correct that the prosecutor is a minister of justice, it is not for him to do defence counsel's job. In any case where the defence considers that a third party may be in possession of relevant material, ( eg child welfare reports, or medical records), it is a matter for the defence to request it from the third party, or, if refused, make an application to the Court upon notice to the prosecution and the third party concerned to seek an order for disclosure. It is then a matter for the Court to determine the question of disclosure by considering the material in the light of the issues in the case and for the third party to make any representations it wishes to make. However, as a matter of professional prudence, the prosecutor who has a reason to suspect that reliable third party material exists which may have a potentially negative bearing on the prosecution case would be wise to enquire whether such material does exist, and what in broad terms the nature of it is. If it

has, or may have, an adverse effect on the merits of his case, the prosecution counsel would doubtless be well advised to consider its contents carefully at an early stage. The prosecutor who, for any reason, knows of the existence of such third party material does, if the prosecution should proceed, have a duty to alert the defence to its existence if they are not aware of it." 15. In *Syvret v AG and another*

[2011] JRC 060A , Sir Christopher Pitchers, Commissioner, said:- "5. That duty set out in the Attorney General's guidelines should, in my judgment, be interpreted in accordance with the recent English case of *R v Flook*

[2010] 1 Cr App R 30 which held that there is also an obligation to 'pursue reasonable lines of enquiry in relation to material held by third parties', and if there is material which might reasonably be considered capable of undermining the Prosecution case or assisting the Defence case, take reasonable steps to obtain it. Reasonable in those words means both reasonable in terms of the line of enquiry, that is to say not fanciful, and also reasonable in terms of the logistics of obtaining documents. That particular case concerned documents in a different country." 16. Whatever the position prior to the Human Rights (Jersey) Law 2000 , the prosecution's duty of disclosure now flows principally from Article 6(1) of the European Convention on Human Rights , which provides that in the determination of a criminal charge against him, an accused should have a fair hearing. Disclosure by the prosecution is a requirement of fairness under that provision, and under Article 7(1) of the Human Rights Law, it would be unlawful for the Attorney General, as a public authority, to act incompatibly with a Convention right. As the Court of Appeal said in *Warren and others v Attorney General*

[2010] JLR 200 the prosecution would perform its duty of disclosure if it disclosed to an accused all the material of which it was aware which might undermine the prosecution case or which might assist the defence (see paragraph 34 of its judgment). In that case, Steel JA added this:- "38. In Scotland, as in Jersey, an accused person is not required to disclose his or her defence prior to trial. Problems which that might create for a prosecutor in determining whether particular material should be disclosed to an accused are avoided by the way in which his duty is formulated - he or she must disclose material that might assist the accused's defence. As Lord Hope of Craighead says ... the various formulations - "are describing a decision about disclosure which must normally be taken before the trial. It is a decision which will be based on an assumption as to what may happen in the future. So the question the Crown must ask itself is what the possible effect would be likely to be if the material were to be disclosed." [Emphasis supplied] 17. In *Warren* , at paragraph 46, Steel JA said this:- "The question which falls to be determined, therefore, is whether, given the timing of the disclosure, the applicants, or any of them, were deprived of a fair trial. In *McInnes v HM Advocate* , in a passage with which Lords Walker of Gestingthorpe and Kerr of Tonaghmore expressly agreed, Lord Hope of Craighead held that, where material has been withheld from the defence, two questions arise to which a test must be applied as follows (2010 SLT 266 at paras 19 - 20):- '19. ... The first question is whether the material

which has been withheld from the defence was material which ought to have been disclosed. The test here is whether the material might have materially weakened the Crown case or materially strengthened the case for the defence ... The Lord Advocate's failure to disclose material that satisfies this test is incompatible with the accused art. 6 Convention rights ...

20. The second question is directed to the consequences of the violation. This is the question that arises at the stage of an appeal when consideration is given to the appropriate remedy: see *Spiers v Ruddy*. In that case it was the reasonable time guarantee that was an issue, but I think that the ratio of that case applies generally. As Lord Bingham of Cornhill put it at P43 (P431) para 17, the Lord Advocate does not act incompatibly with a person's Convention right by continuing to prosecute after the breach has occurred. A trial is not to be taken to have been unfair just because of the non-disclosure. The significance and consequences of the non-disclosure must be assessed. The question at the stage of an appeal is whether, given that there was a failure to disclose and having regard to what actually happened at the trial, the trial was nevertheless fair and, as Lady Cosgrove said in *Kelly v HM Advocate* at p20 para 35, as a consequence there was no miscarriage of justice ... The test that should be applied is whether, taking all the circumstances of the trial into account, there is a real possibility that the jury would have arrived at a different verdict." 18. That real possibility test was adopted by the Court of Appeal in *Warren*, and it is one which we have applied in this case. 19. Before leaving the law on this subject, we must refer to Rule 25 of the Children Rules 2005 as Counsel for the prosecution below evidently considered this rule to be an impediment to disclosure. We understand that care proceedings before the Royal Court continued at the relevant time, and it is possible that documents which were in the possession of the Health and Social Services Department might already have been produced to the Royal Court in the course of those proceedings. Rule 25 provides as follows:- " Confidentiality of documents (1) No document, other than a record of an order, held by the Court and relating to proceedings may be disclosed, other than to - (a) a party; (b) the legal representative of a party; (c) a person appointed under Article 75; (d) a welfare officer; or (e) an expert whose instruction by a party has been authorized by the Court, without leave of the Court. (2) Nothing in this Rule shall prevent the notification by the Court of a direction under Article 29(1) to the Minister. (3) Nothing in this Rule shall prevent the disclosure of any document relating to proceedings by a welfare officer to any other welfare officer unless that other welfare officer is involved in the same proceedings but on behalf of a different party." 20. From our experience, it is clear that in family proceedings under the Children (Jersey) Law 2002, numbers of documents may be before the Court at any given time - social worker reports, contact logs, police reports, psychological and psychiatric reports and other expert reports of different kinds, amongst other documents. It is obvious that some of these reports are generated for the purposes of the proceedings. Other documents are generated for other purposes but may be relevant to the proceedings such as, for example, police reports. It appears to us that the width of the Rule needs attention because it is likely to make more cumbersome the approach to prosecutions of the present kind. The overriding principle is

that in any criminal prosecution, the defendant must have a fair trial. As that requires all relevant material to be available for his defence, it seems to us that Rule 25 should operate to enable it to be so available and if it does not, then the criminal prosecution could not proceed. 21. Amongst the documents which were examined and not disclosed are the notes of meetings with the first complainant and with the independent witness to the second offence. There is also the statement of the manager referred to at paragraph 10 above. It was said by the prosecution that none of those documents contain anything of relevance. There are also logs which are said to be voluminous. They contain, as counsel below put it, "masses of notes which I have been through and I have looked at. These are the entries that are on the systems to which my colleague refers". 22. Before us, Advocate Gollop confirmed that there were a number of documents held by the Health and Social Services Department which he had called for and reviewed. These were the residential daily notes for the period immediately after the alleged offence, the outreach support workers session notes, an HSSD incident review form taken from the Datix material, a residential risk assessment and some further residential daily notes between 11 th

- 18 th November. We were informed that the Health and Social Services Department had not objected to the provision of these documents to the Court, although it seems to us that in theory at least there could have been an objection to the disclosure to the person assessed of the assessment of the risk which he posed because that might increase the risks both to him and to those having care of him. On our request that we might see them to review the disclosure decisions which had been taken, Advocate Gollop told us he was not willing to pass them to the Court unless ordered to do so. The question of disclosure was, he said, a prosecution function, and there was no basis upon which we should therefore see the documents. 23. We should say something about this last submission which was made with the greatest deference to the Court, as one would expect from a Crown Advocate of Advocate Gollop's experience, making submissions which might be expected to be unpopular with the Court. In our judgment, Advocate Gollop was right to say that the prosecution has the primary function as to the control of disclosure of documents. At the end of the day, however, the question of whether a trial is or is not a fair trial is a matter for the Court. It appears to us therefore that in an appropriate case it may well be right for the Court to order the Crown to disclose particular documents, or accept that if the documents were not to be disclosed the prosecution would have to be abandoned. Indeed that is the implication of the judgment of the Court of Appeal in Warren at paragraphs 43 - 44. 24. In our judgment, it must always have been a high probability that in a residential children's home there would be records of one kind or another in relation to incidents which took place and to the particular residents at any given time. This is not fanciful, and the prosecution must have been aware of it. It was the duty of the prosecution to make enquiry of the Health and Social Services Department in order that the records could be examined by the prosecution and consideration given to whether they should be disclosed. 25. What counsel for the prosecution said to the Youth Court in this connection was as follows, from page 14 of the transcript:- "... so, you can see from my schedule of unused material that I have been

through everything and I have clarified on a number of occasions and what I don't want this panel to think is that my learned colleague raises something, we then go away and we ask for something and then more information is provided. That's not right. What has happened is I have gone away and I've clarified again and again that nothing exists, nothing further exists. So, disclosure was completed months ago and I am comfortable making that submission to the Youth Court this morning, after making further enquiries of Victoria Morel ... who is head of information governance, ... that, if there is any further material it must be produced to me for my review. They have told me, in no unequivocal terms, there is nothing else out there." 26. Given the document we have now seen, not disclosed at the relevant time, we think this was a surprising statement. In our view, contrary to the submissions of Crown Advocate Gollop, it is absolutely clear that the Residential Notes should have been disclosed prior to the hearing in the Youth Court. The notes concern the very events which were the subject of the two charges, and were made by staff present at the time. We cannot understand how any prosecutor could read those notes and conclude that they were not relevant. It is true that the notes support in part the prosecution case, but that is not to say that they would not also assist the defence. At the time the disclosure decision was taken, the Appellant faced two charges, and the absence of an entry by the complainant in the Residential Notes at the time about the incident giving rise to the first charge on which he was acquitted (or indeed any entry on that subject until 22:00 hours that night) could and doubtless would have been used in cross examination of that complainant. Leaving that aside, the prosecutor would at the disclosure stage be unaware of the potential inconsistencies which might arise when live evidence were given, as frequently is the case. So, applying Lord Hope [supra] a possible effect of non-disclosure would be to deprive the defendant of material which would be useful in cross examination. The exhortation in the Attorney General's Guidelines on disclosure that "when in doubt, disclose" is not an encouragement to have no doubt. It is an encouragement to disclose. Even at a late stage, defence counsel giving consideration to those notes might well have given further advice to the Appellant as to his plea, in the light of the instructions he received. 27. We think therefore the prosecution made a serious misjudgement in the Court below in not disclosing the Residential Notes. Documents which bear directly upon the subject matter of a charge should routinely be disclosed, not least because they have the potential to be assist both the prosecution (in rebuttal) and the defence. 28. We now consider the other documents which we were told exist but are regarded by the prosecution as containing nothing of relevance. These are the documents described in paragraph 21 above. 29. First of all, given Crown Advocate Gollop's assurance, which we accept, that there was and is no more disclosable material, we do not need to give further attention to the documents not yet disclosed. It appears to us to be very probable that to the extent, if at all, these documents contain further references to the events in question, the documents will be internally consistent. More importantly, however, the defence contention was that the Appellant did not commit the offence of which he was convicted because it did not happen

- he was not there. 30. Accordingly we turn to whether there is any real possibility that the Youth Court would have arrived at a different verdict on the charge of which the Appellant was convicted, had the Residential Notes, or any other material which has not yet been disclosed, been disclosed timeously. 31. As a result of the rules that the burden of proof lies on the prosecution and the defendant need prove nothing, it is accepted practice that the correct direction for a trial judge to give a jury is that where a defendant gives an explanation, the jury should acquit if they think that the explanation is or might be true, but even if they think that the explanation is not true, they must still go on to consider whether the prosecution has proved its case. The same process applies in a prosecution before the Magistrate or the Youth Court. In this case, the Appellant put up an explanation which, if it were true or might be true, would have led to his acquittal. He said he was not there at the time, and therefore he was not guilty of the offences charged. It is clear that the Residential Notes would not have assisted him in that respect. Those notes provided almost contemporaneous written evidence that he was there - notes entered up, in connection with the second charge on which he was convicted, within an hour of the offence taking place. We have also considered the notes themselves against the other evidence in relation to the offence itself. Once again, they do not assist the Appellant and indeed we think that the defence probably would not have wanted to see the notes adduced in evidence, despite the fact that the absence of any record of the incident in respect of which the Appellant was acquitted might have been useful. As a whole, the notes disclose important other evidence, namely that the Appellant had received a number of warnings in relation to this sort of conduct previously. If that evidence had come out before the trial court, it seems to us that the outcome on the charge on which he was convicted would undoubtedly have been the same. We are satisfied that the other documents which have not been presented would have led to the same conclusion. 32. In the circumstances, although we consider the Appellant is right to contend that the prosecution failed in its duty of disclosure, we do not think that that failure had any impact on the conclusion which the Youth Court reached as to his guilt. Nothing in the residential daily notes assists the Appellant in that connection. It remains the case that there was before the Youth Court the evidence of the second complainant and the evidence of the independent witness, which had to go into the balance with the evidence of the Appellant. The document which ought to have been disclosed and was not disclosed supports the evidence of the second complainant. For these reasons, this ground of appeal fails. Joinder 33. At a hearing on 28 th February, the Youth Court (Magistrate Mrs Shaw, Mrs Cross and Mr Beddoe ) determined that the two charges should be heard at the same time. As the judgment shows, the procedure in the Youth Court is that there is no Indictment, and a number of charges may be generated by separate complaints and a number of charge sheets presented to the Court. Frequently, for administrative convenience, a consolidated charge sheet may be prepared showing all charges. The Youth Court noted that the Indictment (Jersey) Rules 1972 do not apply to the Youth Court, but nonetheless the Youth Court would follow the same principles, and the case law adopted in relation thereto. Rule 3 of the Indictment Rules allows a series of offences to be heard together, and for these purposes two incidents can constitute a series, provided that there is some nexus between

them - a nexus being a feature or similarity which makes it in the interests of justice that the two charges are tried together. If the evidence on one charge is to be admitted as evidence of the other on what is known as the similar fact rule that clearly provides a sufficient nexus. However, even if similar fact evidence is not admissible, it does not follow that the two charges should not be tried together. In this case, the allegations were of indecent assaults against adult women, both complainants being staff workers in the residential children's home where the Appellant was resident and each assault taking place on the same premises and on the same date, some seven hours apart. 34. It is obvious that joinder was appropriate and there is nothing in this ground of appeal. 35. However, Advocate Bell also complained of the decision reached by the Youth Court on the same date that the similar fact test was satisfied such that the evidence on one charge was admissible in relation to the other. The Youth Court found:- "18. There is no formal statement of the defence case, however, it appears to this court that two likely defences are

- (1) It never happened (both witnesses are lying); or
  - (2) That there was no intention to assault, the touching was accidental or that the touching was not indecent, or in some other way there was an innocent explanation.
19. In answering the first question posed (above) we find that there are significant similarities between the two allegations such as it would be an affront to common sense to attribute them to coincidence. We conclude that the similarities in the allegations would have significant probity for the trial court in deciding (1) whether the incidents happened at all or (2) whether there was the requisite intention to assault and, if so, whether that touching was indecent or there was some other innocent explanation." 36. We cannot find that the Youth Court misdirected itself in any way in relation to the applicable law. It exercised its discretion in relation to the application of the law in a way which cannot be legitimately criticised in this Court. The fact that not all judges would necessarily reach the same decision does not affect the legitimacy of the conclusions reached. 37. Furthermore, if one has regard to the outcome of the trial, it is apparent that the criticisms of the decision in relation to similar fact evidence hold no water. As it turned out, the complaint of the first complainant was rejected in so far as the intention of the Appellant was concerned. If the evidence on the second charge had actually been used to support the prosecution case on the first charge, it might have been said that the guilty intent later that evening showed a sufficient intent in relation to the incident occurring in the afternoon or early evening - but the Youth Court did not find that. Furthermore, the reasons given by the Youth Court for conviction in relation to the second charge show that there was no part of the evidence in relation to the first charge on which the Youth Court relied for the purposes of entering the conviction. 38. Although there is nothing in this ground of appeal, we do wish to add two things. 39. First, it appears that the judgment of the Youth Court on 28 th February was made available to the Youth Court at the time of trial, but was not available at that time to the Appellant or the prosecution. If that is so, that was an irregularity. We do not think however that this is an irregularity on this occasion such as should lead to the conviction being set

aside. Our understanding is that Magistrate Mrs Shaw gave a full oral judgment which was almost if not entirely verbatim with the subsequently produced written judgment. Both the prosecution and defence counsel must therefore have been fully aware of the detailed reasons for the Youth Court's decision on the issues of joinder and cross-admissibility. Furthermore, there is no suggestion that the Youth Court's earlier judgment was in fact applied to the detriment of the Appellant. Nonetheless, it is improper in an ordinary case that a trial court should receive information which the defence and the prosecution have not seen. 40. Secondly, although no question arises on this appeal, and we have heard no argument on the matter, we note that at paragraph 5 of the Youth Court judgment, when rightly saying that the Indictment Rules should with any necessary adaptations be followed in the Youth Court as in the Royal Court, the learned Magistrate added that "unlike the Royal Court, all members of the Youth Court are judges of fact and law". We doubt that that is correct for the following reasons. First of all, although the Criminal Justice (Young Offenders) (Jersey) Law 2008 (the "2008 Law") is silent as to the respective functions of the Magistrate and the other Panel members sitting in the court, it would be an unusual construction of the legislation to conclude that it was intended by the legislature that non-lawyers (and Panel members are not necessarily lawyers) should determine points of law. There is no logical basis on which that should be so. Indeed, the 2008 Law requires that when the court is constituted, it must consist of the Magistrate and two other Panel members (see Article 1 of Schedule 1). There is no basis to require mandatorily the presence of the Magistrate if it were not intended that the Magistrate should determine issues of law. The significance of this is emphasised by Article 3(1) of the Schedule which is in these terms:- "The decision of the Youth Court on any matter shall be by a majority of the members and shall be pronounced by the chairman, or another member at the request of the chairman, and no other member of the court shall make a separate pronouncement on the matter." 41. It is true that there is in that Article reference to "any matter" which might be thought to include an issue of law, but such a conclusion is antithetical to the requirement that the Magistrate be a member of the Panel, because it is clear from the Schedule that no separate judgment can be given by the majority, which would lead to the possible outcome that the only qualified member of the Court could be outvoted on an issue of law by the lay majority. Such a conclusion makes no logical sense, which accordingly suggests that the proper construction of the legislation is that issues of law are for the Magistrate alone. Indeed, that would be the natural construction given the content of Article 6 of the Human Rights Convention, now part of our domestic law under the Human Rights (Jersey) Law 2000, which requires that there be a fair trial in any civil or criminal case - and indeed if necessary as at present advised, we would have been minded to read down the 2008 Law to reach the conclusion that the Magistrate is the sole judge of law in the Youth Court, and the Bailiff the sole judge of law in the Youth Court Appeal Court. Conviction unreasonable on the evidence? 42. Neither Article 17 nor Article 20(3) of The Magistrate's Court (Miscellaneous Provisions) (Jersey) Law 1949 give any indication as to the basis upon which an appeal from the decision of the Magistrate should be approached by the Royal Court. Where there is simply a complaint about the evidence that was given which it is said

was insufficient to warrant a conviction, the approach of the Royal Court is that set out in *Rushton v AG* 1989/174 where the Court said:- "The Court of course has on many occasions said that its duty in looking at an appeal on conviction from the Magistrate below is to examine the transcripts to see if there is evidence on which the Magistrate concerned could properly have come to the decision he did. If there was that evidence, then even though the Court might not necessarily have come to the same decision, the Court does not lightly interfere with it. The Court has to be satisfied that there was insufficient evidence of the Magistrate to have come to the decision he did, or that he drew the wrong conclusions and inferences from the evidence before him". 43. In *Graham v Attorney General*

[2013] (1) JLR 91, the Court added this:- "We consider that the tests as set out in *Rushton v Att. Gen.* will, absent any other considerations, be sufficient in most cases to lead to an appeal being refused where there was evidence upon which the Magistrate could reasonably reach the conclusion he or she did. However, the qualification in the *Rushton* case that the Court would not lightly intervene where those were the facts, is an important qualification because it chimes with the lurking doubt/sense of unease approach which has been advanced from time to time in the English courts on an admittedly different statutory test." 44. By Article 9 of the Criminal Justice (Young Offenders) (Jersey) Law 2014, the provisions of Part 5 of the Magistrate's Court (Miscellaneous Provisions) (Jersey) Law 1949 apply *mutatis mutandis* to any appeal from the Youth Court to the Youth Appeal Court. Accordingly we adopt the same approach on this appeal as was adopted by the Royal Court in *Rushton* and in *Graham*. 45. What, then, was the evidence which the Youth Court had before it for consideration in relation to the charge on which the Appellant was convicted? The complainant said this:- "[The Appellant] was just very heightened, not listening to simple requests of what he should be doing, uhm maybe making the wrong choices throughout the shift. He needed constant reminders of how to speak to people, how to behave in general, which was sporadic throughout the eight hour shift that I was on. It wasn't consistent, it was sporadic. So, 11 o'clock, I went to leave and [the Appellant] was coming out of the dining room and he approached me from behind and it was very, very quick. So, I just felt his left arm coming up round my neck and then it was really, really quick and then the other hand, the right hand, came round and basically touched my left breast area. Prosecution: When you say he touched your left breast, could you explain how he did that? Witness: It was a very forceful hold around the neck and at the same time as being pushed backwards with the uhm situation I was in, the hand just came very hard and firmly and it was literally a grab and then I said, you know, 'Don't be so silly' and then it was....." 46. In cross examination, a slight inconsistency with her statement made to the police, when she said it was his arm on her breast, was put to the complainant, but she kept to her account. In re-examination, she told the Court that the Appellant had been "more touchy feely recently" and that she had given him no permission at all to be touching her. 47. The Youth Court also heard evidence from an independent witness, a co-worker at the residential children's home, who said this:- "At 11pm, [the complainant] was getting ready to leave. I had to follow behind her to move the staff car that was parked in

front of her car so that she could leave the driveway. Uhm , I followed [the complainant] out to the front door. [The Appellant] got in between us and put [the complainant], in a jokingly mood, in a headlock from behind. Uhm , we were both asking him to stop. He was in a playful mood and carried on. I came out the front door so I could stand in front of them and then saw his right hand was on her breast. I asked him to stop and stop being silly because he was in a playful mood. He removed his right hand and kept her in a headlock. Uhm and we carried on asking him to stop being silly and he shoved her towards the door and to me..... Prosecution: Could you describe how long, sorry how the [Appellant] was grabbing [the complainant's] breast please? Witness: Uhm cupped loosely but in a purposeful manner. Prosecution: And how long for? Witness: Seconds, from, from when I was behind, I don't know where his hand was when I was behind, but, when I came to the front, it was there for seconds before we managed to get him to stop." 48. The Appellant gave evidence to say this:- "Defence: What do you say about the allegation that [the complainant] has told the Court today? Witness: Uhm , I don't know why in anyone's mind they would lie about something as serious as this, but, in the same sense, why would, why should I have to uhm say that I have done something when I know I haven't done it and I don't think with everything that the staff have said about me is the truth, because I know myself that I was not in the house at the time and the logs do say that I was out missing by the police at half 11 uhm and this did not happen and that this is the honest truth." 49. When cross-examined about both the first and the second charges, the Appellant said that he was not in the house. In answer to the specific allegation in respect of the charge on which he was convicted, he said "I wasn't in the house". 50. In our judgment it is plain that there was an issue of fact which the Youth Court had to assess. If the Court considered that the explanation of the defendant was or might be true, they would acquit, and even if members of the Court thought it was not true, they then had to consider whether the prosecution had proved its case. In its decision, the Youth Court said that the members of the Court were in no doubt that the complainants were telling the truth and that the Appellant was at the residential children's home when the alleged assaults took place. They had not been discredited in cross-examination and were found to be strong witnesses, and that they were reliable. 51. The Youth Court then considered the nature of the evidence on each offence. The Court considered that in relation to the first complainant, the Crown had not discharged the burden of showing that the Appellant had acted in an 'angry, revengeful, rude, insolent or hostile manner' and that charge was dismissed. In relation to the second charge, the Court said this:- "This was not a hugging, which appeared to be acceptable behaviour at the home. [The Appellant] placed witness B in a headlock, which was an aggressive act, and then grabbed her breast, albeit, for a matter of seconds. This was a rude and hostile assault and, therefore, [the Appellant] would have known that witness B would not have consented to such action which went far beyond the hugging which appeared to be acceptable behaviour at the home and to which we have previously referred. Accordingly, we were satisfied beyond reasonable doubt that [the Appellant] was guilty of an indecent assault upon witness B." 52. In the light of the evidence which we have recited, and given that the assessment of that evidence was for

the Youth Court, there is no basis upon which this Court could properly have concluded that the conviction below was unsafe. The criticisms below, namely that there was some delay by the complainant in making her complaint to the police (three days) and that there was a risk of collusion if not contamination of evidence in respect of prosecution witnesses who work together, were matters for consideration by the Youth Court. They were raised fairly and squarely in the defence summing up, and the Youth Court nonetheless considered the witnesses to be strong and reliable. There are no grounds for intervention in this Court on that point. 53. For all these reasons, the appeal against conviction fails and is dismissed. 54. There are two further matters which we wish to raise. This Appellant is clearly a vulnerable young man. As a result of circumstances which are absolutely not his fault, he has found himself in the care of the States. From that fact one can infer that he may not have yet come to appreciate the different boundaries which apply to all of us in how we react to others. Young people do sometimes react adversely to any form of authority, whether parental or States authority. That is so commonplace as to be entirely natural. Nonetheless, all of us have to learn where the boundaries are. The Courts can perhaps help the Appellant towards that lesson, but ultimately it is one that only he can learn for himself. He is not unintelligent, and he should think about these things. It is true, as Advocate Bell contended below, that this was not an assault where something very obviously indecent took place. It was an indecent assault at the lowest level, but for all that it would have been troubling and unpleasant for the complainant. It showed her no respect. 55. As a consequence of the conviction, the Appellant has been placed on the Sex Offenders Register. At one point below, Advocate Bell suggested that this was a factor which ought to have led the Youth Court to acquit him of the charge. That was not an appropriate submission. Whether he was guilty of the charge or not is a quite separate matter from the consequences which flow, whether those be the sentence imposed by the Court or the mandatory rule imposed by statute that he be subject to the notification requirements under the sex offenders' legislation. Nonetheless, in respect of the latter point, although not right in the context of acquittal or conviction, Advocate Bell was right to say that courts should try to avoid any unnecessary escalation of offending, and should ensure that the criminal justice system does not stigmatise a young person where that is undeserved. The notification requirements were introduced by statute in order to protect the community from sex offenders. At the Appellant's age, and on the information currently available to us now in the absence of any social enquiry report or other psychological evidence, it is unclear as to whether this Appellant poses a real threat in terms of further sexual offending, or whether he is simply at an age where he has inappropriately crossed the boundaries from acceptable to unacceptable behaviour. That will be a matter for the sentencing court to consider when having regard to the minimum period before which an application can be made for the notification requirements to be dis-applied to him, but it does not follow in our judgment that the statutory period of five years, which is the starting point, should necessarily be the right period in this case. Whether it is too long or not will depend upon evidence not available to us but which will be available to the sentencing court. 56. Secondly, the youth justice system includes the

use of parish hall enquiries. The stigmatisation of young people by their appearance before the Youth Court is a factor which the prosecution routinely do take into account in considering whether or not a prosecution is necessary in the public interest. Incidents of the kind which have led to this prosecution would in most cases where the defendant was not in care have resulted in peremptory domestic justice rather than criminal proceedings. The young person concerned would in an ordinary household be expected and be expecting to receive the firmest of warnings that this was unacceptable and to abide by such warning thereafter. It appears from the Residential Notes and in part from the evidence actually given before the Youth Court that the care workers in this case have previously attempted to deliver such warnings to this Appellant, but they have been disregarded. He should use his intelligence to learn from that. Equally, there will no doubt be cases where the prosecuting authorities consider that the appropriate intermediate warning to a young man would be a parish hall inquiry and warning. Authorities AG v Vaughan (unreported Royal Court November 1974). Syvret v AG and another

[2011] JRC 060A . Human Rights (Jersey) Law 2000. European Convention on Human Rights. Warren and others v Attorney General

[2010] JLR 200 . Children Rules 2005. Children (Jersey) Law 2002. Indictment (Jersey) Rules 1972. Criminal Justice (Young Offenders) (Jersey) Law 2008. Magistrate's Court (Miscellaneous Provisions) (Jersey) Law 1949. Rushton v AG 1989/174. Graham v Attorney General

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