JERSEY / JUDGMENT

Fernandes v AG 07-Jun-2021 [2020] JCA 164 (07 June 2021)

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Court of Appeal 7 June 2021 Before : Jonathan Crow, Q. C., President; Lord Anderson of Ipswich, K. B. E. Q. C., and; David Perry, Q. C.. Mark Fernandes -v- The Attorney General Advocate J. C. Gollop for the Appellant. Ms R. C. L. Morley-Kirk, Crown Advocate, for the Respondent

JUDGMENT

PERRY JA: This is the judgment of the Court.

Introduction

1. The Appellant, Mark Fernandes, is now aged 26. On 21 st October 2020, following a six-day Assize trial before the Royal Court (Sir William Bailhache, Commissioner, and a jury), he was convicted of one count of rape, involving sexual intercourse, contrary to Article 5 of the Sexual Offences (Jersey) Law 2018 , and acquitted of a second count, also of rape, and again involving sexual intercourse. Both offences were alleged to have been committed against the same female complainant, ("the Complainant"), in the early hours of Sunday 5 th May, 2019. The sexual intercourse which gave rise to the conviction on Count 1, occurred in a public place, namely the harbour area of St Helier. It was witnessed by a number of individuals, two of whom gave evidence as defence witnesses at the trial. The second allegation, of which the Appellant was acquitted, took place some time later in the bedroom of the Appellant's home address when only he and the Complainant were present. By the time of the material events, the Complainant had consumed a significant amount of alcohol and she was drunk. The Crown's case was that the Complainant did not consent to either of the acts of sexual intercourse as she was incapable of doing so by reason of her intoxication, and that the Appellant either knew or could not reasonably have believed that she was consenting. For his part, the Appellant admitted both acts of sexual intercourse and claimed that he had genuinely and reasonably believed that the Complainant was consenting. The issues for the jury at trial were whether the complainant was capable of consenting to sexual intercourse, and if not, whether any belief that she had consented was reasonable. 2. The Appellant seeks leave to appeal against his conviction on three grounds: first, that there was insufficient evidence for the jury to reach a conclusion adverse to him on the issue of the Complainant's lack of consent; second, that insufficient weight was given by the jury to the

evidence as a whole (including the evidence of two witnesses who had seen the sexual intercourse at the Marina); and third, that the jury's differing verdicts on the two counts are so logically inconsistent and unreasonable that the guilty verdict should be set aside. In terms of Article 26(2) of the Court of Appeal (Jersey) Law 1961 , the Appellant argues that his conviction should be quashed on the ground that it is unreasonable or cannot be supported having regard to the evidence, or that the verdict should be set aside on the ground that there has been a miscarriage of justice. 3. Before addressing the three grounds of appeal, it is necessary to explain the relevant

background.

The Facts 4. On the evening of Saturday, 4 th May 2019, the Complainant, then aged 21, and the Appellant, then aged 23, attended the birthday party of a mutual friend at the Ambassadeur Hotel in St Clement. Although the Complainant and the Appellant had known each other for around eight years, they were not close friends and had not socialised with each other since they were teenagers. Present at the party were ten individuals referred to at the trial as the party group. The party group was assigned to a table in the hotel function room for dinner and the Complainant and the Appellant sat next to each other. CCTV footage from the function room and bar area of the hotel showed the Complainant and others, including the Appellant, from around 7:00pm when the party began until around midnight when it came to an end. The CCTV footage from the bar area of the hotel showed the Complainant being served thirteen alcoholic drinks, including vodka, Jägermeister and tequila. She was served seven of those drinks in a forty-five minute period between 11:15pm and midnight. It is also the case that bottles of wine were available on the assigned table. 5. At shortly after midnight on 5 th May 2019, the Appellant and four others of the party group left the hotel and travelled by a pre-arranged car to St Helier with the intention of continuing the birthday celebrations at the Mimosa Bar near Liberation Square. These five members of the party group arrived in the layby area just outside Liberation Square at approximately 12:12am. The driver of the car then returned to the hotel to collect three other members of the party group, including the Complainant. 6. The Complainant, with two female friends, left the hotel at around 12:16am. By this time she was obviously drunk. She was unsteady on her feet and had difficulty walking. The car arrived at the hotel at 12:19am. CCTV footage from the front of the hotel showed the Complainant falling heavily onto her back as she attempted to get into the car. She was helped to her feet and placed into the vehicle by the night porter of the hotel who said in evidence: " she couldn't hold herself up " The driver of the vehicle described her as extremely drunk and said that she was unable to find her own way onto the back seat. He noted that during the journey into St Helier her head was " swinging left and right ". 7. The Complainant and her two friends arrived in the area of Liberation Square at around 12:30am. When they arrived, the Complainant had difficulty getting out of the vehicle. She lost her balance and fell out, face down. She was helped to her feet by her two friends. CCTV footage from outside the front entrance of Liberty Wharf in Liberation Square showed that the Complainant was incapable of standing upright or walking without assistance. When helped to stand with her back against a wall, she was unable to maintain her balance and fell heavily onto her front. At 12:40am

she was refused entry to Liberty Wharf on the basis of her obvious state of drunkenness. At 12:41am the Complainant fell over. 8. At around 12:42am, the Complainant was assisted by one of her female friends across the Square and placed onto a nearby bench. While there, she vomited over the shoes of one of her other friends. At around 12:45am, two of the Complainant's female friends went to use the nearby public toilets near to the soup kitchen on the corner of Conway Street and Cross Street. One was carrying the Complainant's bag which contained her mobile telephone. 9. At around 12:50am, the Appellant approached the Complainant who was at this time still on the bench where she had been placed by her friend. A short time later, the Appellant and the Complainant were both walking away from the area of Liberation Square in the direction of the St Helier Marina. The CCTV footage from the St Helier Marina showed that the Appellant and the Complainant crossed the road from Liberation Square and headed towards the Marina at 12:51am. On the CCTV footage the Complainant appeared to be extremely drunk and the Appellant appeared to be guiding or controlling her movements. She was wearing one high-heeled shoe, with the Appellant carrying the other. At 12:52am, the Appellant and the Complainant went along the marina promenade and stopped near a low wall, where they remained for seven minutes. At 12:59am the Appellant picked up the Complainant and they moved out of range of the CCTV cameras. They remained out of sight of any CCTV camera until 1:17am. It is accepted by the Appellant that during this time he had sexual intercourse with the Complainant, and this act of sexual intercourse formed the subject matter of Count 1 of the Indictment. 10. At 1:17am, both the Appellant and the Complainant came back into the sight of the CCTV cameras as they walked back along the marina promenade towards Liberation Square. The Complainant was by this time bare footed and could not walk without the Appellant's assistance. At around 1:18am, the Appellant flagged down a Jersey Hire driver to take them both to his home address in St Clement where he lived with his parents. According to the driver, the Complainant was " wasted " or " drunk ". She was unable to stand without assistance, had no bag and was not wearing any shoes. Having been assisted into the vehicle by the Appellant, she was silent throughout the journey. When they arrived at the Appellant's home address at around 1:22am, the Complainant had to be lifted out of the vehicle. Later, the Jersey Hire driver noticed vomit over the back of his seat. 11. Meanwhile, back in Liberation Square, the Complainant's friends realised that she was missing. Knowing that she was drunk, they used her telephone to contact her boyfriend. This was at 1:23am. Over the hours that followed, searches were made of a number of locations. During a search of the Marina, one of the Complainant's shoes was found on a bench near to a gangway used by boat owners to get to their boats. The other shoe could not be located. Telephone calls were made and messages sent to the Appellant's mobile telephone, all of which went unanswered. At around 4:00am, a number of the Complainant's friends, including her boyfriend, went to the Appellant's home address. They rang the doorbell but there was no response. 12. A few minutes before 6:00am, the Complainant woke up in the Appellant's bed. She was wearing her dress but no underwear. She was confused, scared and had no memory of how she had come to be there. Nor did she have any recollection of the events of the previous evening from around 11:15pm (save for a fragmented memory of falling over in Liberation Square). The Appellant was lying on the floor by the bed, awake and fully clothed. 13. The Complainant asked to use the Appellant's telephone to call her own mobile telephone and when she did so, her

boyfriend answered. Her boyfriend agreed to collect her from the Appellant's home address and he arrived there at around 6:00am and waited outside in his car. The Appellant went outside to speak to him. Inside the premises, the Appellant's mother noticed the Complainant use the downstairs toilet before leaving. 14. In response to questions from both the Complainant and, separately, her boyfriend, the Appellant denied that any sexual activity had taken place. He said words to the effect that the Complainant had been very drunk, that he had taken her to his home and that nothing had happened. When the Appellant returned inside the premises his mother asked who the young woman was and why she had been in the house. In response, the Appellant said: " She is in trouble. She had nowhere to stay and I was helping her. " To this, the Appellant's mother replied that there was a police station on the way to their house (one possible interpretation of this remark being that it was not necessary for the Appellant to bring the Complainant to their home). 15. Between 7:00am and 8:00am on 5 th May 2019, that is about an hour or so after the Complainant had left his home address, the Appellant was in contact with one of his friends. One of his messages was in the following terms: "[The Complainant] just messaged me on Snapchat asking me what happened last night and I don't know if she's with boyf or not so I'v made out nothing happened. No, I have. I've said nothing happened and we slept separately and she said promise Mark" . Given his later acceptance that sexual intercourse had taken place, the Prosecution case was that the Appellant had lied to the Complainant in an attempt to conceal what he had done and in the knowledge that it was wrong. 16. The Complainant, who was unable to remember anything of the events, had pains in her vaginal area and was concerned that something of a sexual nature had happened. At 7:56am she telephoned a friend and expressed her concerns. Later at 10:44am, she went to the Accident and Emergency Department and then to Dewberry House Sexual Assault and Referral Centre, where she was examined by a doctor. The doctor took blood and urine samples from the Complainant as well as swabs from her vagina. These various samples were sent for testing. The test results from the swabs confirmed that sexual activity had taken place. 17. An expert toxicologist, Mrs Sarah Tarrant-Wooding, later calculated the Complainant's likely blood alcohol levels based on her estimated alcohol consumption, as shown in the CCTV footage, and bodyweight. This suggested that at around 1:00am on 5 th May, the Complainant's most likely level of blood alcohol concentration was around 265 milligrams of alcohol per 100 millilitres of blood. By way of a guide this is over three times the permitted amount of alcohol for driving (the limit for driving is 80 milligrams of alcohol per 100 millilitres of blood). Mrs Tarrant-Wooding explained that this concentration of alcohol would be associated with an " extreme degree of intoxication in the average social drinker " who " may be experiencing such effects as stupor, impaired consciousness, reduced reflexes, depressed respiration or incontinence." Mrs Tarrant-Wooding also explained the impact of alcohol on memory and how it is possible to have a memory gap, known as a 'blackout'. This phenomenon is not to be equated with a loss of consciousness; a person might be capable of carrying out physical movements during a blackout episode, but would have no subsequent memory of what they had done. 18. The blood and urine samples taken from the Complainant on 5 th May were also examined by Mr Nicholas Hubbard, Official Analyst of the States of Jersey. He too carried out a calculation to estimate the Complainant's blood alcohol concentration at around 1:00am on 5 th May 2019. His result was broadly the same

as the result reached by Mrs Tarrant-Wooding: the most likely level being around 260 milligrams of alcohol in 100 millilitres of blood. 19. On Monday 6 th May 2019, at 2:30pm, the Complainant provided a statement of complaint to the States of Jersey Police. Arrest 20. On Monday 6 th May 2019, the Appellant voluntarily attended the States of Jersey Police Headquarters and was arrested and cautioned on suspicion of rape. At 8:40pm, the Appellant's bedroom was searched by police officers and a pair of underwear worn by the Complainant on 4/5 th May 2019 was found in a drawer. He was interviewed under caution on three occasions between 7 th May and 11 th July 2019 and made no comment to all material questions as he was entitled to do under Jersey law. The Investigation 21. In the course of the investigation, the States of Jersey Police made an appeal through the media for witnesses to come forward. None did so. Independently of the appeal for witnesses and through their own enquiries, the investigating officers obtained statements from two security guards, Mr Peter Jeffrey and Mr Lukasz Surowiec, who had been working at the Marina on the night in question. They had both witnessed the sexual intercourse between the Appellant and the Complainant on the marina promenade.

Procedural History

22. On 17 th November 2019 the Appellant appeared before the Royal Court where he entered not guilty pleas to an Indictment containing one count of rape and one count of sexual penetration without consent. The indictment was later amended to include two counts of rape and it was on these two counts that the Appellant stood trial between 14 th and 21 st October 2020. The Prosecution Case 23. The Prosecution case was clearly stated in the Crown Advocate's opening address to the jury: by the early hours of Sunday 5 th May 2019 it was obvious to anyone that the Complainant was incapacitated by drink. She was incapable of standing, incapable of holding onto her belongings, incapable of walking unaided and incapable of making basic decisions. She was, by 12:30am, extremely vulnerable and incapable of consenting to sexual intercourse. At a time when her friends had gone to the public toilets, the Appellant had taken advantage of her vulnerability and had walked her from the bench near Liberation Square to the more isolated area of the marina promenade where the intercourse took place. 24. In support of its case, the Prosecution relied on various pieces of evidence. The Complainant herself gave evidence of her drunken condition and how as the night wore on her memory had faded until it had become a blank. Other witnesses from the party group gave evidence of her incapacity from around 11:15pm onwards. This was supported by evidence from the two drivers and the various pieces of CCTV footage from the hotel, the area of Liberation Square and the Marina. The Prosecution also relied on the expert evidence dealing with the Complainant's estimated blood alcohol level and the impact of alcohol on memory. There was also evidence of the Complainant's initial complaint to her friend on the morning of Sunday 5 th May 2019, and the various comments made by the Appellant to the Complainant, her boyfriend and to his female friend after the event. 25. The jury also had the benefit of detailed formal admissions and an agreed chronology of events (based on the times shown on the CCTV footage and the timings of various telephone calls and messages). The formal admissions made clear that the

Appellant accepted that he had sexual intercourse with the Complainant at the Marina on 5 th May 2019 and later on the same date in his bedroom at his parent's home. The Defence Case 26. While the Appellant did not himself give evidence, four witnesses were called on his behalf. 27. The first two witnesses were the security guards, each of whom had been working at the St Helier Marina boat show in early May 2019. The first security guard gave evidence to the effect that around 1:00am on 5 th May, while in the area of the Marina, he saw a female and a male (whom he identified as the Appellant) cross the road from the area of Liberation Square and sit on a low wall on the marina promenade, about five or six metres away from his location. He stated that they began to engage in sexual activity, before walking away along the promenade. He later saw them sitting on a bench engaging in further sexual activity. As he put it in his evidence, he " saw the lady on top of the gentleman... riding the guy ". While he said that he did not know how she had come to be in that position, he described her as appearing " happy in the moment ". Mr Jeffrey added that the female spoke to the male, using the word " amore ". The Appellant said nothing. The security guard claimed not to have been concerned by what he saw. He saw other people walk past who seemed similarly undisturbed. Later, in the early hours of Sunday morning, he had been approached by two men who were searching for the young woman, and he had told them of what he had seen. 28. In cross-examination, the security guard agreed that as the Complainant crossed the road from Liberation Square, she was stumbling. He also agreed that in his witness statement, dated 7 th May 2019, he had described the Complainant as " very, very, very drunk " and " annihilated ". He accepted in evidence that he had seen the Appellant lift up the Complainant's dress and that later, the Appellant picked up the Complainant and carried her to the bench on the pathway where the sexual intercourse had taken place. He described the Appellant's handling of the Complainant as a " bit boisterous " and a " little rough ". 29. The second security guard gave similar evidence. He too saw the sexual intercourse. He attempted to speak to the couple because he was worried: in his view it is not normal for people to have sex in public. He described how at the conclusion of the sexual intercourse, the Appellant pushed the Complainant to the ground and tried unsuccessfully to put her shoes on. In cross-examination, he confirmed that the Complainant looked " really, really drunk " and was unresponsive. He said that when the Appellant pushed the Complainant from the bench onto the ground, she landed on her back and appeared not to react. 30. The third witness, a close friend of the Appellant since the beginning of 2019, described him as " Extremely caring. Very loving and very funny. Very loyal ". She said that she had never witnessed any change to his personality when he drank and she had never seen him do anything inappropriate. As for her knowledge of the relevant events, she said that on the evening of 4 th May 2019, she had been celebrating her own birthday. The Appellant was unable to attend owing to his prior commitment to the party at the Ambassadeur Hotel. On the morning of 5 th May 2019, at 7:43am, the Appellant his friend and told her he had slept with the Complainant. The Appellant and his friend later exchanged messages about a message from the Complainant who was asking whether anything had happened. The friend explained that the Appellant's concern was that the message had been sent by the Complainant's boyfriend who might seek to cause him harm.

In the course of their exchanges, the Appellant sent a message to his friend in which he stated: " I've said nothing happened and we slept separately. And she [the Complainant] said , 'Promise Mark'" . To this the friend said: " Good say [to her] you fell asleep on my bed and I slept on the couch that's it." The friend also gave evidence that she and the Appellant had exchanged messages about two short videos, of two minutes and five minutes duration respectively, in which the Appellant claimed to have recorded some of the sexual intercourse. The friend had not seen either video and could not say if either had ever existed. On this aspect of the case, it was an admitted fact that the Appellant's telephone had been examined by an expert, who, on reviewing the extracted data, had been unable to find either of these videos. This left open the possibility that the videos had never existed, or, if they had existed, that they had been deleted from the Appellant's telephone. 31. The fourth and final defence witness was, a former girlfriend of the Appellant, who gave evidence of his good character. Directions to the Jury and Jury Deliberation 32. At the conclusion of the evidence, the Commissioner provided a draft of his summing up and legal directions to prosecution and defence counsel for their consideration. The directions were the subject of discussion and ultimately agreement. 33. The Commissioner's summing up began on 20 th October 2019 (the fifth day of the trial). The jury retired that same day at 3:09pm. Later that afternoon, the jury sent a note to the Court asking to view parts of the CCTV footage from Liberation Square and the Marina. Following discussions with counsel, the Commissioner decided he would ask the foreman of the jury to be more specific about what it was the jury wanted to see. At 4:08pm, the jury returned to Court and were asked if they wanted to see the entire CCTV footage from Liberation Square (around 20 minutes' worth) and from the Marina (around 8 minutes' worth). The foreman replied: "No, we don't want to see the... big gap between, we just want to see it when it comes back out afterwards, the bit where they're up at the wall we want to see... And the bit where he goes further on. After that, we just want to see the bit where they come back out. We don't want to wait to see people walking up and down." 34. There was further clarification as to the precise timing of the particular segment and the relevant CCTV footage was played to the jury, without objection from the Defence. The jury then retired to continue deliberations until around 5:00pm, when they were allowed to go home. The jury resumed their deliberations at around 10:00am on 21 st October 2019. Later that morning one of the jurors indicated that she felt unable to continue to serve as a juror for personal

reasons.

She was discharged at 12:30 pm. 35. At 2:17pm, after they had been deliberating for over five hours and 30 minutes, the jury were given a majority verdict direction. At 4:59pm the jury returned to court and the Commissioner gave them directions in relation to a question they had asked in the following terms: " At the Defendant's home is the sequence of events put to the Complainant by Defence Advocate which she could not recall evidence of that sequence of events, noting the burden is on the Prosecution to make out?" The jury then retired at 5:01pm, and, at 5:05pm, returned to court and delivered their verdicts on both counts of the Indictment:

guilty on Count 1 and not guilty on Count 2.

Legal Framework

The Statutory Provisions 36. As is well known, rape is a statutory offence pursuant to the Sexual Offences (Jersey) Law 2018 . Article 5(1) of the Law provides as follows: "(1) A person ('D') who intentionally penetrates the vagina, anus or mouth of another person ('C') with D's penis, commits an offence if - (a) C does not consent to the penetration; and (b) D does not reasonably believe that C consents." 37. Article 2 addresses the issue of "consent", which is defined as "free agreement": Article 2(2). By reason of Article 2(6)(b), a person " does not consent to an act if, at the time of the act or of the alleged consent, the person... is incapable because of the effect of alcohol or any other substance (whether voluntarily consumed or otherwise) of consenting to the act" . 38. Article 3 is an interpretation provision which deals with defences and reasonable belief in consent, age or the absence of exploitation. In material part it provides as follows: "(1) ... (2) Paragraph

(3) applies if, in proceedings under this Law, a question arises as to whether the defendant reasonably believed that another person consented to an act. (3) The question is to be determined having regard to all the circumstances, including in particular- (a) whether the defendant had taken any steps to ascertain whether the other person consented to the act; and (b) if so, what those steps were. ..." 39. A consideration of the 2018 Law as a whole makes clear that it had the twin aims of promoting free and independent autonomous decision-making while at the same time providing protection for those in positions of vulnerability. So far as the offence of rape is concerned, the essence of the crime is that sexual intercourse (or other penetration) takes place without consent. 40. Article 2(6)(b) makes special provision for individuals who are not able to look after themselves because they are asleep, unconscious, under the effects of alcohol (or other substances), or otherwise lack capacity. The conclusive statutory presumption is designed to ensure that sexual acts, including intercourse, take place only with the unambiguous agreement of both parties. The rigour of the statutory presumption in Article 2(6)(b) is balanced by the requirements of Article 5(1)(b) and Article 3 which make clear that a defendant is not guilty of rape if he reasonably believed that the complainant consented to the act of penetration. The 'reasonable belief in consent' provisions are an important aspect of the statutory scheme. Whether a belief is reasonable is to be judged not by the defendant's subjective (personal) opinion, but by an objective (impersonal) standard having regard to all the circumstances, including, in particular, whether the defendant had taken any steps to ascertain whether the other person had consented to the act in question. The policy of the law in this regard is obvious. A burden of restraint is imposed on individuals who know that another person's ability to consent is likely to be in doubt because of their incapacity, through for example intoxication. In these circumstances a person is required to weigh information in the balance, to arrive at a decision and act accordingly. The Case Law 41. In support of his application for leave to appeal, the Appellant relies on four authorities: R v Badjan

(1966) 5 Cr App R 141; R v Durante

(1972) 56 Cr App R 708; R v Fanning

[2016] EWCA Crim 550 , [2016] 2 Crim App R 19; and X v Attorney General

[2010] JCA 212 . 42. In Badjan , a decision of the English Court of Appeal, it was held that where a key aspect of the defence case is not put before the jury in summing up, it is generally not possible for the Court of Appeal to uphold the conviction. In his helpful oral submissions to this Court, Advocate Gollop properly accepted that the Commissioner's directions to the jury were fair and balanced and properly left to the jury the issues raised by the defence case. In the circumstances, he abandoned any argument to the effect that the principle in Badjan had any application to the Appellant's case. We need say no more about it. 43. The three remaining authorities relate to inconsistent verdicts. Durante and Fanning , both decisions of the English Court of Appeal, confirm that the onus is on an appellant to establish that two verdicts are so inconsistent that they cannot stand together. In other words, it must be demonstrated that no reasonable jury applying its mind to the evidence could have reached the conclusion that it did. In Fanning , Lord Thomas CJ emphasised that it is necessary to demonstrate that the verdicts are not merely inconsistent but are so inconsistent as to demand interference on appeal. In X , this Court applied the Durante test (which the decision in Fanning subsequently confirmed to be the correct approach). Grounds of Appeal Ground 1 44. In support of the first ground of appeal (insufficiency of the evidence on the issue of consent) Advocate Gollop submitted that there was an abundance of independent evidence which undermined the Crown's case and which provided support for the Appellant's reasonable belief in the Complainant's consent. He relied in particular on the following four matters: (i) The Complainant's evidence that she stated that she had no recollection of the relevant events and which provided no assistance to the Prosecution on the issue of consent. (ii) The Crown's own witnesses who confirmed that the Complainant was laughing and was conscious and had engaged in conversation even up to the point at 12:42am when she was assisted to the bench near Liberation Square. (iii) The two independent eyewitnesses (security guards) whose evidence supported the defence case. It was also submitted that the Crown's failure to call the witnesses was contrary to the Appellant's right to a fair trial. (iv) The CCTV footage from the Marina which showed that six other members of the public were present on the marina promenade. None of these individuals intervened or raised the alarm. Subsequently, they did not come forward in response to the public appeal for witnesses. 45. In her equally helpful submissions in response to all three grounds of appeal, Crown Advocate Rebecca Morley-Kirk contended that there was ample evidence to justify the jury's verdict of guilty. There was direct evidence from the Complainant who said that she would not have consented and had no recollection of doing so (or of anything else). There was also the evidence from a variety of sources concerning the Complainant's drunken condition. The jury were directed by the Commissioner to consider " all the circumstances " when they came to assess the reasonableness of the Appellant's belief, and the decision

not to call the two security guards as prosecution witnesses was not inconsistent with the Crown's duty to act fairly. Nor did it undermine the fairness of the trial. In relation to the CCTV footage and the unavailability of individuals who appear to have witnessed the sexual intercourse, Crown Advocate Morley-Kirk submitted that the fact that potential (unidentified) witnesses did not give evidence caused no unfairness: it is not possible to know what those individuals saw or heard and the Appellant's argument is based on speculative assumptions about evidence that was not before the jury. 46. In our view, notwithstanding Advocate Gollop's careful submissions, there is no substance in this ground of appeal. The reasons for our conclusion are as follows. 47. First, the Complainant gave evidence in person before the jury. She stated that she had no recollection of events from around 11:15pm on Saturday 4 th May until she woke up in the Appellant's bed on Sunday 5 th May (although she did say that she had a fragmented memory of falling over in the area of Liberation Square). While she could not remember what had happened between her and the Appellant, she was sure that she would not have consented to sexual intercourse. The evidence in relation to her consent and her incapacity was a matter properly left to the jury who saw the Complainant give evidence. There was ample evidence that, by the time she left the hotel, the Complainant was, by reason of her drunkenness, incapable of consenting to the act of sexual intercourse. This included the CCTV footage from the front of the hotel, which showed the Complainant falling heavily as she tried unsuccessfully to get into the car before the journey to St Helier. There was also the evidence given by those Crown witnesses who had been present at the birthday party, as well as the drivers of the two cars. On the basis of this evidence, the jury were entitled to conclude that the Complainant was heavily intoxicated, so much so that she was incapable of standing upright without assistance. There was also the expert evidence given by Mrs Tarrant-Wooding and Mr Hubbard, that the Complainant's blood alcohol concentration at 1:00am on 5 th May was likely to have been three times the legal limit for driving. The Complainant's evidence was also consistent with what the Appellant himself had told the Complainant when they exchanged messages during the morning of Sunday 5 th May 2019. The Complainant's evidence in chief on this aspect included the following: " I messaged Mark on Snapchat and asked him if anything happened... He said no, I was too drunk so he took me home." It follows that there is no substance in the suggestion that the Complainant was unable to assist the jury on the issue of consent. Nor does the Complainant's lack of memory have any bearing on the correctness of the jury's verdict. This lack of memory was itself capable of being regarded by the jury as supporting the Prosecution case that the Complainant had been incapable of giving consent. The jury were reminded of the important parts of the evidence and directed by the Commissioner in clear terms that the Prosecution were required to prove beyond reasonable doubt that the Complainant did not in fact consent to intercourse. The short point is that there was evidence upon which the jury could properly conclude that the Complainant did not consent to sexual intercourse and they were properly directed on how they should approach this issue. 48. Second, the fact that the Complainant engaged in conversation, was laughing and appeared conscious even up to the point when she was assisted to the

bench near Liberation Square was a matter for the jury to consider along with all the other evidence in the case. The jury were reminded of this evidence in Advocate Gollop's closing address. Despite this, it is apparent from the jury's verdict that they were sure that the Complainant did not consent to sexual intercourse. There was ample evidence to support this conclusion. 49. Third, we do not accept that the Crown's decision not to call the security guards was either improper or contrary to the Appellant's right to a fair trial. The principles concerning the prosecution's duty to act fairly and to call evidence are well-known. They are summarised in the decision of the English Court of Appeal in R v Russell-Jones

[1995] 1 Cr App R 538. For present purposes, it is sufficient to note that generally speaking the prosecution must have at court the witnesses, requested by the defence, whose statements have been served as witnesses on whom the prosecution intend to rely. In deciding which statements to serve, the prosecution have an unfettered discretion, but must normally disclose to the defence as unused material statements not served as part of its case. Applying those principles to the Appellant's case the position is as follows. On 16 th December 2019, the Prosecution served the statements of the two security guards on the Defence as unused material, and made it clear that it did not intend to rely on the evidence of either witness. There was nothing improper about adopting this course. Had they been called as prosecution witnesses, the jury might well have been confused about the nature of the Prosecution case and it would have been unfair to the Complainant. It is also relevant to note that this procedural complaint was not raised with the Commissioner either in advance of or during the trial, no doubt for the simple reason that there was no perceived or actual unfairness. Moreover, during the course of his oral submissions, Advocate Gollop was unable to identify any advantage that would have accrued to the Defence if they had been able to cross-examine the two witnesses as opposed to examining them in chief. Nor was he able to identify any disadvantage to his case that resulted from the stance taken by the Prosecution. There was none. Having been called to give evidence by the Defence the evidence from both witnesses was available to the jury and it was ultimately a matter for the jury to decide what to make of it. In the context of the case as a whole, it is also to be observed, on one view, that the evidence given by these two witnesses was capable of supporting the Prosecution case. We see nothing improper in the conduct of the Prosecution and reject the complaint of unfairness. 50. Fourth, while the CCTV footage shows that as many as six people walked past the Complainant and Appellant when they were on the marina promenade, none of these individuals came forward in response to police appeals for assistance in the investigation. There is no evidence from any of them. In his 'homily' at the beginning of the trial and in his summing-up at the end of it, the Commissioner directed the jury that they were required to reach their verdicts solely on the basis of the evidence adduced in the trial. This conventional and fundamental direction of law has an obvious and benign purpose. It is intended to avoid the danger of decision-making based on speculation or guesswork. The complaint raised by the Appellant on this aspect of the appeal is contrary to this

fundamental principle. It depends on making unwarranted assumptions about what individuals, who did not give evidence to the jury, might have seen, heard or believed. 51. We also note that the jury were given accurate and helpful directions on the ingredients of the offence of rape and how they should approach their evaluation of the evidence. In relation to the ingredients of the offence the Commissioner directed the jury as follows: "There are three elements which the Crown have to prove, so that you can be sure, if you are to find the Defendant guilty. For the purposes of the case, the first element is that the Defendant had sexual intercourse with the Complainant such that his penis penetrated her vagina. The Defendant admits that he did and you can therefore be sure that there was such penetration. The second element relates to the state of mind of the Complainant. The Prosecution must prove so that you are sure, that she did not in fact consent to the intercourse... The third element which the Prosecution must prove is that if you are sure that the Complainant did not or could not consent to intercourse, you must also be sure that the Defendant did not believe she was consenting or, if he did believe she was consenting, was unreasonable in holding that belief. In deciding whether his belief was reasonable, you have regard to all the circumstances, and these include anything said or done by her which you are sure he knew about and any steps he took to find out if she was agreeing. In considering this second issue, whether she consented to sex with him, and this part of the third issue, whether he knew she was not consenting to sex with him, you are necessarily judging her state of mind and then his state of mind. Juries are faced every day with the task of assessing what was in a person's mind and there is nothing unusual about that. You must apply your common sense to both issues and your experience of the world and human behaviour and draw your conclusions about the state of mind of each of them on all the evidence you have heard from the relevant sources before you." 52. Later, the Commissioner, having summarised the important aspects of the evidence, including the evidence from the two security guards, directed the jury: "So if you decide that the Complainant did not or could not consent to intercourse on the morning in question you will have to consider whether the Defendant had any belief she was consenting and therefore whether any such belief was reasonable. I direct you that the law requires you to have regard to all the circumstances and the law says that you should consider what steps, if any, the Defendant himself took to satisfy himself that she did genuinely consent." 53. These clear directions fairly and properly left the relevant issues to be decided by the jury. The jury concluded that the Prosecution case on Count 1 was proved beyond reasonable doubt. There was a clear and proper evidential basis for the jury to do so. It follows that we reject the Appellant's argument on Ground 1. Ground 2 54. The Appellant's argument on Ground 2 (that the evidence in support of the reasonableness of the Appellant's belief in consent was not given sufficient weight) is a variation of the argument on Ground 1, with the focus being on the Appellant's state of mind. Advocate Gollop submits that the jury's attention was directed by the Prosecution to the CCTV footage and that the overwhelming "dominance" of this evidence prevented any fair and proper assessment of the Appellant's belief in consent. In support of his argument, Advocate Gollop made three essential points: (i) The repeated playing of the CCTV footage of the Complainant when she was not

in the company of the Appellant was prejudicial to the Appellant's case in relation to his state of mind. (ii) The sexual intercourse at the Marina was witnessed by ordinary members of the public who, so it is said, may safely be assumed to be ordinary reasonable people. (iii) The Crown's expert, Mrs Tarrant-Wooding accepted in cross-examination that a person affected by alcohol could suffer a black out and have no recollection of their behaviour, even though the behaviour might appear to another person to be conscious and coherent. 55. We see no substance in these submissions for the following reasons. 56. First, there is no doubt that the CCTV footage, as a contemporaneous record of material events, was important and significant evidence in the case. It had been edited by agreement and both parties accepted that the footage was relevant to the issues at trial. It was played during the relevant parts of the trial and both sides sought to rely on its contents, albeit for different purposes. At the conclusion of the evidence the jury received directions from the Commissioner who made it clear that " the CCTV clips are just part of the evidence and you must when deciding on your verdict, you must have regard to the entirety of that evidence." The Commissioner also directed the jury to approach the evidence of the CCTV footage with a degree of caution: "My own view was that until we get to the point where the Defendant walks...to the bench [to which the Complainant had been carried], the extent of his knowledge of her condition is limited to his awareness of that condition at the time he left the Ambassadeur Hotel. It is a matter for you." 57. The Commissioner went on to say: "It seems to me to be difficult, on the evidence, to be sure that [the Defendant] would have known at the Marina at one o'clock that [the Complainant] had fallen over outside the hotel at five minutes to midnight, or whatever it was." 58. These directions properly served to emphasise the care with which the jury should approach the CCTV footage. In our view there is no basis for the submission that the playing of the CCTV footage was prejudicial to the Appellant or that it was given undue prominence. There was (unsurprisingly) no submission to this effect at the trial. 59. Second, we have addressed the Appellant's submissions in relation to the eyewitnesses in paragraphs 49 and 50 above, it is only necessary to add that it was for the jury to decide on the conclusion concerning the Appellant's state of mind and in particular the reasonableness of any belief he held that the Complainant was consenting. This is an objective test. It does not depend upon what any onlooker or bystander might have considered reasonable or unreasonable. We also wish to endorse the Commissioner's general warning, in his 'homily' to the jury at the beginning of the trial, about the danger of engaging in stereotypical assumptions and preconceived notions of what constitutes rape or how a person who is raped is expected to behave. Having been directed to put aside any fixed ideas, the jury were left to decide the case by reference to the legal directions and strictly on the basis of the evidence. 60. Third, the relevant part of the evidence given by Mrs Tarrant-Wooding was accurately summarised by the Commissioner: "Finally, she said that alcohol intake was also capable of affecting memory. Sometimes this would be temporary - a grey out- and sometimes it would be total - a black out - but she also accepted that even when there was total memory loss, a black out, an individual can still act coherently in the doing of actions which he or she later cannot recall - paying a bill, driving, engaging in sexual activity - and other

people might think they are acting perfectly normally." 61. The Commissioner also made it clear that the evidence of the expert witness was only one part of the evidence to which the jury should have regard. Having returned a verdict that was available to them (and it was not suggested otherwise at trial), there is no basis for this Court now to conclude that the verdict should be set aside on the ground that it is either unreasonable or cannot be supported by the evidence. Ground 3 62. In his Contentions in support of Ground 3 of the appeal (inconsistent verdicts), Advocate Gollop submits that there is a logical inconsistency between the verdicts, and it is not possible (where the facts for each count were almost identical) to postulate a legitimate train of reasoning which could sensibly account for the inconsistency. In these circumstances, it is submitted that the inconsistent verdicts demand interference by this Court. 63. The starting point in our consideration of this ground of appeal is the direction given to the jury to consider separately the case presented by the Prosecution in respect of each count. The Commissioner directed the jury as follows: "...your verdict on the two counts need not be the same. That, therefore, means that you can find the Defendant guilty or not guilty on both Counts 1 and 2, or you could find him guilty on one and not guilty on the other. It is a matter for you, but I suggest to you that if you were to acquit the Defendant on Count 1 of the Indictment, it must follow that you should acquit him on the second count because you could only have acquitted him because you were not sure that the Complainant did not consent or was unable to consent at 1:10 or that the Defendant didn't reasonably believe that she had; and, if that were so, it wouldn't on the face of it be logical to suggest that you were sure an hour or so later when, if anything, the Complainant's condition can only have improved. Theoretically, you can find him not guilty on one count and guilty on the other, but whichever way round, but I just say to you that you think hard if you were to find him guilty on Count 1 before you found him guilty on Count 2." 64. This direction is entirely conventional. It was given with the agreement of both the Prosecution and the Defence and properly respected the jury's constitutional role as the tribunal of fact. It acknowledged that the evidence relied on in support of each count was different. In relation to Count 1, there was, among other matters, the CCTV evidence as well as the evidence given by the witnesses called by the Prosecution and the Defence. In relation to Count 2, the evidence was more limited. While there was a formal admission that sexual intercourse had taken place at the Appellant's address, the Complainant could not recall any of the events and there were no other witnesses, apart from the evidence of the Jersey Hire driver who had taken the Complainant and the Appellant to St Clement at around 1:22am (the time of their arrival). The difference in the evidence appears to have prompted the question concerning the sequence of events at the Appellant's home which the jury sent to the Commissioner at around 4:57pm on the second day of their deliberations. When the Commissioner came to answer the question, at 4:59pm, he reminded the jury " if you are not sure, doubt is to be resolved in favour of the Defendant ." The jury retired to continue their deliberations at 5:01pm and returned to Court to deliver their verdicts at 5:05pm. In our view this sequence of events is telling. It indicates that the jury gave careful consideration to the evidence and conscientiously applied the

Commissioner's directions on the law. 65. As the authorities noted at paragraphs 41 and 43 above make clear, if there is some evidence to support a verdict, it is not the function of the appellate court to substitute its view of the facts for one which was open to the jury. In this case the position is clear. The Commissioner's direction was in conventional terms. He emphasised that the facts were for the jury. He directed the jury to give separate consideration of each count. He was not invited to give a direction that it was necessary for Counts 1 and 2 to be decided in the same way (and nor would such a direction have been appropriate). As is to be expected, the jury heeded the Commissioner's direction and gave effect to it. There is no arguable irrationality or illogicality in the jury's approach and no plausible basis to conclude that the verdicts are inconsistent. 66. For these reasons we see no substance in the Appellant's third ground of appeal and we conclude that the verdicts are a logical and rational reflection of the differing nature of the evidence adduced in relation to each count and the differing circumstances in which the alleged offences occurred. 67. Having considered with care the Appellant's three grounds of appeal, we have also taken the opportunity to read (and re-read) the entire transcript of the proceedings. We have also viewed the relevant CCTV footage in its entirety. Having done so we have had regard to the terms of Article 26 of the Court of Appeal (Jersey) Law 1961 and in particular the words " the Court of Appeal shall allow the appeal if it thinks that the verdict should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence, or that the judgment of the court before which the appellant was convicted should be set aside on the ground of a wrong decision of any question of law or that, on any ground there was a miscarriage of justice." We have concluded that there was evidence to go to the jury. We have concluded that there was no misdirection or error of law. The verdict of guilty on Count 1 of the Indictment is a verdict that was properly and reasonably open to the jury on the basis of the evidence adduced at the trial. In these circumstances the application for leave to appeal is dismissed. Authorities Sexual Offences (Jersey) Law 2018. Court of Appeal (Jersey) Law 1961. R v Badjan (1966) 5 Cr App R 141 R v Durante (1972) 56 Cr App R 708. R v Fanning

[2016] EWCA Crim 550 . X v AG

[2010] JCA 212 . R v Russell-Jones [1995] 1 Cr App R Page Last Updated: 15 Jun 2021 BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII

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