

JERSEY / JUDGMENT

Ferreira v AG [2003] JCA 011 (17 January 2003)

[2003] JCA 011

COURT

COURT OF APPEAL

BEFORE

R. C. Southwell, Esq., Q. C., President;
Sir de Vic Carey, Bailiff of Guernsey; and
P. S. Hodge, Esq., Q. C.

Rui Miguel Ganhaõ FERREIRA

-v-

The Attorney General

Appeal by

Rui Miguel Ganhaõ

FERREIRA

against

conviction

at a criminal assize on 13

th

August, 2002,

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17th January, 2003

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Before:

R. C. Southwell, Esq., Q. C., President;
Sir de Vic Carey, Bailiff of Guernsey; and
P. S. Hodge, Esq., Q. C.

Rui Miguel Ganhaõ FERREIRA

-v-

The Attorney General

Appeal by

Rui Miguel Ganhaõ

FERREIRA

against

conviction

at a criminal assize on 13

th

August, 2002,

following a not guilty plea
to:

1 count of:
Indecent assault.
Leave to appeal was granted by the
Deputy Bailiff on 18
th
November, 2002.
Applications (1) for an
extension of time
within which to apply
for leave to appeal against
sentence
;
and (2) for leave to appeal against the sentence of 2 ½ years'
imprisonment passed on the appellant on 20th September, 2002.
The applications for an extension of
time and for leave to appeal placed directly before the plenary Court without
first being submitted to a Single Judge for consideration.
Advocate P. D. James for the appellant;
A. D. Robinson, Esq., Crown Advocate.

JUDGMENT

THE PRESIDENT: 1. This is the judgment of the Court. On 12 and 13 August 2002 Mr Rui Ferreira was tried in the Royal Court on a charge of having on 18 March 2002 at The Moorings Hotel, Gorey Pier, St Martin indecently assaulted Miss G. He was convicted by a unanimous verdict of the jury, the Royal Court being presided over by Commissioner Francis Hamon OBE. On 20 September 2002 Mr Ferreira was sentenced to 2½ years' imprisonment. He applied for leave to appeal against conviction and sentence. On 14 November 2002 the Deputy Bailiff gave leave to appeal against conviction. In the letter to the Assistant Judicial Greffier, the Deputy Bailiff stated as follows: "I grant leave to [appeal] on the basis that there does not appear to have been a direction in the summing up on the dangers of convicting in the absence of corroboration. It is my understanding that, hitherto, the law of Jersey has been thought to require the judge to give such a direction in the case of sexual offences, although I am not aware whether it has been the subject of specific decision at Court of Appeal level. The Court would also have an opportunity of considering the fact that a number of other common-law jurisdictions have abolished the old requirement to give a warning, although I think that has usually been achieved by statute rather than by judicial decision." 2. The evidence in this case showed that there was a direct and total conflict between the accounts of the incident given by the complainant, Miss G, and by the defendant, Mr Ferreira. 3. Put shortly, Miss G's account was that she was lying in bed in the early hours of the morning of 18 March 2002 in her room in the staff quarters of The Moorings Hotel. She had been watching television and had dozed off. She woke to find Mr Ferreira lying partly across her body and making sexual advances. He was kissing her both on the lips and the breasts and biting her breasts, and she was pinned down by Mr Ferreira's hand across her throat. Nevertheless he succeeded in removing both her vest top and his own T-shirt. She succeeded in kneeing him, which lifted him up and he fell off the bed. He went over to the door and she then

recognised him. She was screaming for her boyfriend Marcus, and for the police. Mr Ferreira said nothing, smirked at her and left. The door to her room had been left unlocked because she had been expecting the return of her boyfriend Marcus, who also had a room in the same staff quarters. Miss G was working as a receptionist at the hotel, and she phoned Mrs Joanne Walker, the senior receptionist, at her home in Nelson Court on the other side of the courtyard. Mrs Walker suggested that she come to Mrs Walker's house and she did this, keeping the phone connection open on her mobile phone until she arrived. It was her evidence and that of Mrs Walker that she was in a state of no little distress. She also phoned a male friend of her boyfriend, who worked at a hotel in St Aubin, and he gave evidence that she was in distress in describing the incident. Later that morning she made a complaint to the police, and the arrest of Mr Ferreira followed. 4. Mr Ferreira's evidence was to an entirely different effect. Put shortly, he had been having a night out, in the course of which he had been with Miss G's boyfriend Marcus. Marcus was with two Polish girls and a male friend and had given Mr Ferreira lifts in his car, finally dropping him off in the early hours of the morning at Gorey Pier. Having been dropped off at Gorey Pier Mr Ferreira made his way to the staff quarters at The Moorings Hotel, and went to the room of Domingos Pereira Encarnacao, who was called Dominic, and who had the room next to Miss G. He talked to Dominic for a short time. However, Dominic gave evidence that he was not visited that night by Mr Ferreira. Mr Ferreira had previously met Miss G on a number of occasions, though he understood her first name to be L, not T. He had on one occasion, about a week before, visited Miss G's room in company with her boyfriend. On the night of 12 and 13 March 2002 he had drunk about 5 or 6 pints of beer and one vodka red bull. He knocked on the door of Miss G's room, she was awake, and he asked her if he might sit down on her bed. They talked for about 5 to 10 minutes. Miss G then started kissing him. He told her that he was Rui, not her boyfriend Marcus. But she continued kissing him, and he kissed her. Both of them took off their shirts, and intimacies continued for about 15 minutes. He got up to close the door which he had left open. She then told him to go away or she would call the police. She was talking at a normal volume and was not screaming. He then put his shirt on and left the room, and returned to where he lived. 5. As we have indicated, there could hardly be greater differences between the accounts which Miss G and Mr Ferreira gave. Both accounts contained inconsistent elements as we will describe later in this

judgment.

But Miss G's account, backed by the evidence of her obvious distress following the incident, was a cogent one to place before the jury. 6. Mr Ferreira was represented on the appeal by Advocate James, who did not appear at the trial, and the Crown was represented both at the trial and before us by Crown Advocate Robinson. 7. Mr James raised four issues on the appeal. Two related to the summing up by Commissioner Hamon. A third raised the question whether there had been on the jury a jurymen who was actually or potentially hostile to Mr Ferreira: the evidence concerning this issue is not yet sufficiently advanced for this issue to be argued before us, and we therefore heard no argument about it. The fourth issue was whether the verdict of the jury was unreasonable because it could not be supported having regard to the evidence, and in particular

the inconsistencies in Miss G's account of the incident. 8. The first issue relating to the summing up concerned the directions to the jury as to consent and Ferreira's belief that Miss G had consented. Towards the beginning of the summing up, the Commissioner told the jury that the real issue of the case was consent. They had first to decide whether or not she had consented. If they decided that she had not consented, then they had to consider whether Ferreira knew that she did not consent. If they were not sure whether or not he knew, then they would have to go on to consider recklessness. We now quote verbatim what the Commissioner next said: "... you go on to the next issue, which is, are you sure this Defendant was reckless as to whether Miss G consented to being kissed or touched in the circumstances of indecency. Now for the purposes of this case I will direct you that, so far as the law is concerned, the Defendant was reckless as to whether Miss G consented if you are sure he did believe that she was consenting and couldn't have cared less whether she consented or not." The Commissioner went on to consider the issue as to honest belief in consent. 9. To anyone reading the transcript of what the Commissioner said, it is immediately clear that something went wrong in this direction about the issue of recklessness, because as so read it does not make sense. The word "not" was omitted. The closing words of the direction should have been: "the Defendant was reckless as to whether Miss G consented if you are sure he did not believe that she was consenting and couldn't have cared less whether she consented or not." (our underlining) 10. But the jury, hearing these words and not reading them, were at obvious risk of being confused as to what the judge's direction was on the difficult legal concept of recklessness in sexual offence cases. Mr James submitted that on this ground alone, having regard to the importance of the jury being left in no doubt as to the test of recklessness, there had been a miscarriage of justice within Article 25(1) of the Court of Appeal (Jersey) Law 1961. 11. Mr Robinson, on the other hand, argued strongly and cogently that the jury would readily have appreciated the absence of the word "not" in this part of the direction, because the mistake was such an obvious one. Further, he argued, even if there was a risk that the jury might not have understood the recklessness direction that could not have made any difference. If Miss G's version was accepted, then no question of consent or belief of consent could have arisen and it was plain that Mr Ferreira knew she did not consent, while on Mr Ferreira's version consent was clear because Miss G was said to have initiated the sexual intimacy. 12. In our judgment Mr James is right in saying that there was an appreciable risk that the jury did not understand what the direction was on recklessness, and that the position is not as simple as Mr Robinson submitted. The jury were not bound to accept in every particular either the version of Miss G or that of Mr Ferreira. We consider that there was a material misdirection, and return later in this judgment to consider whether the threshold in Article 25(1) of the 1961 Law is reached. 13. Mr James's second ground concerned corroboration. It is a long-standing policy and practice of the Jersey Courts that in cases involving alleged sexual offences a corroboration direction must be given: see *Vibert v Attorney-General*

(1991) JLR 247 CA and *Halley v Attorney-General* 1996 unreported except in 1996 JLR N11: Court of Appeal. It is clear that the Commissioner had intended to give the standard corroboration direction, because as Advocate Robinson informed this Court, about half-way through the trial the Commissioner called the Advocates into his room to discuss what

matters they considered could amount to corroboration. The Advocates and the Commissioner agreed that the only such matter was the evidence of Miss G's distress after the incidents. We note that this discussion took place without Mr Ferreira being able to be present with the interpreter, and that there was no recording of what was said. We will return to this point later in the judgment. 14. We were also told that the evening before the summing up Mr Robinson had, with the knowledge of the defence Advocate, sent to the Commissioner a copy of the judgment in Halley (above) and offered the assistance of counsel in making further submissions on corroboration to him, an offer which unfortunately was not taken up by the Commissioner. 15. In the summing up the Commissioner did not give to the jury the standard direction on corroboration which ought to have been given. The standard direction provided by the Judicial Studies Board of England and Wales in June 1991 (before the change in the law in England and Wales referred to in the Deputy Bailiff's letter) reads as follows: "Experience has shown that people who say that sexual offences have been committed against them sometimes, and for a variety of reasons, tell lies. Such false allegations are easy to make and frequently very difficult to challenge, even by an entirely innocent person. So it is dangerous to convict on the evidence of the complainant alone unless it is corroborated, that is independently confirmed, by other evidence. Corroboration is independent evidence, that is evidence which does not come from [X] [the complainant] which confirms in some important respect not only the evidence that the crime has been committed but also that the defendant committed it. I say 'confirms in some important respect' because it is not necessary that there should be independent evidence of everything that [X] has told you. [It is for me to point out to you the evidence which, if you accept it, is capable of independently confirming [X's] evidence. I shall do that later in this summing-up. But it is for you to decide whether it does, in fact, provide independent confirmation of [X's] evidence.] [It would be for me to point out to you the evidence which, if you accepted it, would be capable of independently confirming [X's] evidence. But there is none.] Nevertheless, [even if your view is that ...'s evidence is not independently confirmed] [despite the absence of independent confirmation], and providing you bear in mind the danger of convicting without it, you may rely upon ...'s evidence if you are sure that [he] [she] is telling the truth." 16. In our judgment the absence from the summing up of such a standard direction on corroboration was another, more serious deficiency. 17. Advocate Robinson submitted that in the particular circumstances of this case such a direction was unnecessary. The Commissioner directed the jury that Miss G's complaint was not independent evidence of what happened and could not of itself prove that the complaint was true (page 4 of the summing up). He repeated this direction (page 6 of the summing up) and went on to tell the jury that if they accepted the distressed condition of Miss G as genuine, then they might look upon it "as some form of corroboration". He also submitted that the Commissioner fairly summarised the evidence and the prosecution and defence cases on the

facts.

18. In our judgment the standard direction on corroboration was essential. What the Commissioner said, as recorded on pages 4 and 6 of the transcript, was appropriate if, and only if, he had already given that direction. In the absence of that direction what he said could not be fitted by the jury into the correct legal framework, and his reference to "some form of corroboration", in particular, had the potential to cause misunderstanding of the legal essentials on the part of the jury. 19. Mr Robinson also picked up the point mentioned by the Deputy Bailiff in his letter, and submitted that the Court of Appeal should take this opportunity to hold that it is no longer a requirement of Jersey common law that a corroboration direction be given in cases of alleged sexual offences. He referred to the ending of such a requirement in relation to such cases and to accomplice evidence by statute in England and Wales. A statute had been required in England and Wales because the English common law rule had previously been fortified by statutory requirements for a corroboration direction. He also referred to the Report of the Law Commission (LAW COM No 202) of September 1991 on Corroboration of Evidence in Criminal Trials, and the recommendations in that Report for the abolition of the corroboration requirement which had led to statutory intervention by Parliament. He submitted that in Jersey, the requirement being purely a common law requirement, it was open to this Court to hold that no such requirement should be made. 20. In our judgment this is an invitation which we should refuse. The requirement of a corroboration direction in cases of alleged sexual offences is long-established in Jersey common law. This Court should hesitate long before undertaking the abolition of the requirement. It is for the States of Jersey to move to abolition by enactment if the States were to consider that step desirable in the public interest, after a full investigation of the rival arguments for retention and for abolition. It is our judgment that (i) the arguments deployed by the Law Commission are not strongly persuasive; (ii) there is a not inconsiderable argument for the position in Scots law which requires actual corroboration of the commission of all criminal offences (save for some statutory exceptions); and (iii) we have not been provided with sufficient information to form any view in favour of abolition. We must therefore follow Vibert and Halley (above) in upholding the requirement in Jersey law. 21. In the light of these two deficiencies in the summing up we are satisfied that there has been a miscarriage of justice within Article 25(1) of the 1961 Law. 22. Mr Robinson submitted that nevertheless this Court should apply the proviso to Article 25(1). In this context we have to consider Mr James's submissions as to the inconsistencies in the prosecution case and Mr Robinson's riposte as to the strong points in that case and the weaknesses in Mr Ferreira's evidence. 23. It is convenient to take first Advocate Robinson's points which he argued very cogently as showing the implausibility of Mr Ferreira's account. We list the main points:- (i) Miss G was a mere acquaintance of Mr Ferreira. (ii) He did not know her correct first name. (iii) It was around 3 am on a Monday morning, when he was least likely to be a welcome intruder into her bedroom. (iv) He had been drinking a fair amount. (v) She had drunk no alcohol and was entirely sober. (vi) He was therefore even less likely to be welcome. (vii) She was, even on his version, half asleep

and on her version asleep and woken up by him. (viii) His story of having first gone to Dominic's room for a chat was firmly denied by Dominic. (ix) He said that she initiated the sexual activity which was highly improbable since he was little known to her, she was on any view half asleep, and she was expecting her boyfriend Marcus to rejoin her in her room. (x) His story of her sudden change of mind was implausible if she had really initiated the intimacies. (xi) There was no reason at all for Miss G to make up her story, to tell Mrs Walker and the friend of her boyfriend of her experience and of her distress about it (which they witnessed), and to involve herself with the police, medical examination and the trial. (xii) If she feared the effect on her boyfriend, she would have been more likely to remain silent. (xiii) The evidence of distress immediately afterwards was strong from several witnesses. (xiv) She chose to return from Crete to give evidence, despite the first hiccup about her flight back. As we have said, these are powerful points in support of Mr Robinson's overall submission that guilt was established, and therefore there was no "substantial miscarriage of justice." 24. For his part Advocate James produced a written list of what he called "Inconsistencies" in the prosecution case. (We mention, but without criticism of Mr James, that it would have been more appropriate to provide this to the Court and to Prosecution Counsel before the hearing, even if this meant a few minutes delay in the start of the hearing.) Again we list his main points:- (i) Miss G said more than once in evidence that she was screaming and shouting at Mr Ferreira and for the police. Yet Dominic and the other room occupant heard only male and female voices at a normal volume. (ii) Her evidence was that he was lying across her body with his hand at her throat to restrain her. Yet according to her he managed to remove both her vest/shirt and his long sleeved T-shirt. (iii) Her evidence was that he bit her breasts, pressed heavily on her lips and mouth, and had his hand at her throat. Yet there was no evidence of any relevant mark on her body. In particular there were no bite marks and no bruising. (iv) Her evidence was that she scratched him. The evidence of the physical examination of him did not support anything beyond minor scratches which could readily have been caused by himself in the ordinary course of events. (v) She said that he was silent throughout, whereas one of the witnesses heard his voice and identified it as his. (vi) She said that she kneed him so that he fell off her and off the bed. Yet he made no sound, expressed no sign of pain, and left at a normal pace having smiled (or "smirked" as she put it) at her. (vii) She did not immediately look for her boyfriend, though she was expecting him to return to her room. (viii) The first person she rang was a male friend of her boyfriend, though she had forgotten about this. (ix) She did not ring Mrs Walker until half an hour after the incident. (x) The state of her bed and bed-linen was not consistent with her story of a struggle in which she was so fearful that she urinated. 25. We consider that these inconsistencies, taken together, are somewhat less compelling than the points which Mr Robinson presented to us. But the test to be satisfied if we are to apply the proviso is that we must be sure that the verdict of the jury would not have been different if the jury had been given the necessary directions on recklessness and corroboration. Of that we are not sure. We have not seen the witnesses. We do not know what impact the witnesses made on the individual jurors. We are not sure that the verdict would have been the same. Accordingly we do not apply the proviso, we allow the appeal against conviction and we set aside the

conviction of Mr Ferreira. 26. Because this is the second case this week in which this Court has set aside a conviction for lack of the requisite directions to the jury, we end with this suggestion. In England and Wales it is standard practice for the directions to the jury to be considered in open court in the presence of the defendant but in the absence of the jury, and for sufficient time to be given by the Judge, and by Counsel for the prosecution and for each defendant, to ensure that the directions are complete and in terms appropriate for the particular case, while still based on the standard directions provided by the Judicial Studies Board. It may be thought by those involved in criminal cases in this Island that this is a practice which could helpfully be adopted here. Authorities *Vibert -v- AG*

(1991) JLR 247 CofA. *Halley -v- AG* (1996) JLR N11. Report of Law Commission of September, 1991, on Corroboration of Evidence in Criminal Trials (LAW COM No.202). Page Last Updated: 27 Mar 2017 BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII

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