

JERSEY / JUDGMENT

JG v AG [2024] JRC 115 (15 May 2024)

[2024] JRC 115

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JUDGMENT

THE DEPUTY BAILIFF:

Background

1. On 21 March 2024, we heard and determined an appeal against conviction. We now give our reasons for making the orders which we did on that occasion.
2. The Appellant was convicted by the Magistrate of two sexual offences following a two day trial that took place on 6 and 7 November 2023. The Appellant was nineteen years old at the date of the trial. He was twenty when the appeal was heard.
3. The Complainant in this case was approximately five years younger than the Appellant. We will call her M for the purpose of this judgment to preserve her anonymity. The first alleged offence occurred in June 2016 when M was seven years old and the Appellant was twelve. The second alleged offence occurred in May 2020 when M was eleven and the Appellant was aged sixteen.
4. The 2016 allegation arose out of events that took place at an afternoon barbeque, and the 2020 allegation arose during an arranged sleepover at the home of M's aunt.
5. The 2020 allegation came to light in October 2021, when M informed a member of staff at her school. This led to M being video interviewed in November 2021, December 2021 and January 2022.
6. The Defendant was charged with the 2020 allegation on 19 January 2023.
7. It was in January 2023 that M made disclosure in relation to the 2016 allegation. She made a video disclosure later that month and the Appellant was charged with that matter on 29 March 2023 when jurisdiction was declined by the Magistrate.
8. The Royal Court took the view that the case was within the jurisdiction of the Magistrate's Court and remitted the case for trial to the Magistrate's Court.
9. The Appellant appealed his sentence and conviction on 11 January 2024, having been sentenced on 10 January 2024.
10. The Magistrate gave written reasons for her decision to convict the Appellant and subsequently gave reasons for the sentence which she imposed.
11. The test on appeal was recently confirmed by the Royal Court in *McAdam v AG*

[2022] JRC 280, where the Court said at paragraph 20: "The relevant test is that set out in *Graham v AG*

- [2013] JRC 014 , which is considered the appeal provisions in the Magistrate's Court (Jersey) Law 1949 which has been essentially replicated in the Criminal Procedure (Jersey) Law 2018 . The key passage is an extract from the decision in *Rushton v AG* (Royal Court October 16th 1989 Unreported) 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 come to the same decision, the Court does not likely interfere with it. The Court has to be satisfied that there was insufficient evidence [for] the Magistrate to have come to the decision he did, or that he drew the wrong conclusion and inferences from the evidence before him."" 12. Accordingly, the key issue for us to determine is whether or not the Magistrate could properly have come to the decision which she did on the evidence before her. The Court will only interfere on appeal if the Court is satisfied that there was insufficient evidence for the Magistrate to have come to the conclusion which she did, or that she drew the wrong conclusions and inferences from the evidence before her. 13. It is important for the Court on appeal to bear in mind that it did not see or hear the evidence before the trial judge, although such considerations perhaps have less force when, as in this case, all the video evidence which constituted M's evidence-in-chief was available for the Jurats to review on appeal, and some of the important evidence upon which the Crown relied was unchallenged and was read to the Magistrate. Having said that, the Magistrate had the benefit of seeing M cross-examined and was able to evaluate the whole of the Appellant's evidence. On appeal, we only have transcripts of that material. 14. The offences charged in this case were different as one predated the enactment of the Sexual Offences (Jersey) Law ("the 2018 Law"). Accordingly, in relation to the 2016 allegation, the Appellant was charged with procuring M to commit an act of gross indecency contrary to customary law, and in relation to the 2020 allegation he was charged with intentionally touching another person when the touching was sexual (i.e. a sexual touching charge) contrary to Article 13 of the 2018 Law. Although the facts of both alleged offences were different, both could have been charged as customary law indecent assault which survives the enactment of the 2018 Law. 15. In relation to both allegations, both M and the Appellant agreed that they were present at the same event on the same day, but the Appellant denies any indecency on either occasion. Neither alleged offence was independently eye-witnessed. The Magistrate correctly identified at paragraph 6.6 that the key issue for the Court was M's credibility
- could the Court be sure of her evidence and so convict the Appellant? 16. The Crown did not argue that the evidence relating to either charge could provide evidential support for the other. Accordingly, the Magistrate confirmed at paragraph 9.2 of her careful judgment on the evidence that she had reached her conclusions in respect of each charge separately, without regard to the other. Therefore, we will examine, although not in detail, the evidence in support of each charge separately. The 2016 allegation 17. The Magistrate, rightly in our opinion, said that she approached the evidence in relation to the 2016 allegation " with some

caution " as the events took place seven years prior to trial when M was seven years old. The first disclosure of any sort (although not in terms of the complaint she ultimately made) was made on 15 October 2021, when M principally complained about the 2020 matter. However, she is recorded as telling a teacher that when she was five or six years of age, the Appellant " touched her around her private parts ". The note went on to say " She can't remember if this was over her clothes" . She said that this happened at her house. She then went on to give a more detailed account in relation to the 2020 allegation which we will, where necessary, refer to below. 18. In the ABE interview that took place on 21 November 2021 M said that when she was five years old, they were having a party at home. The Appellant was jumping on her bed and at some point the Appellant had kissed her on the cheek. Her aunt had come into her bedroom, although she had not seen what had happened. M had told the Appellant to stop, he had said no, and then M walked out of her bedroom. During this ABE she was asked what had happened and she said "He was just touching me on my waist and kissing me and then yeah". This had gone on for two minutes. This incident was not the subject of the charging decision that took place in January 2023, which was when the Appellant was charged with the 2020 allegation. 19. On 23 January 2023, M asked to speak to a teacher at school and said there was something that she could not stop thinking about but was embarrassing, then wrote down " When I was 6 he made me give him head. I was in my bedroom and he unzipped his trousers and he told me too be quiet put his finger too his lips. He pushed my head down and I was trying too get back up..." . This led to an ABE disclosure interview one week later on 30 January 2023 during which M said that she was prompted to make the disclosure as there was a school assembly about domestic abuse and she became upset. She was asked to explain what had happened and she said that in her bedroom the Appellant had forced her to put his penis inside her mouth. She said there were " a load of other kids there " but they were having too much fun to notice. She said this happened when she was " around six " (it was ultimately agreed that she was seven at the time of the event she spoke of). She described a party at her home with the adults outside the house and many children inside. She said there were about fifteen other children in her bedroom at the time and they were " jumping and stuff " and dancing to music. She said that it happened on her bed which was the top bunk, although below it was a desk and not another bunk. She described it as being like a cabin bed. She said there were other people on the bed at the time and that the Appellant lifted her on to the bed, put the covers over them, pulled down his jeans and that he had grabbed her and started putting his penis in her mouth. She said that she tried to get up but he pushed her head so that his penis went in her mouth. She said that she was confused and did not know what she was doing. She said " I just wanted to join in with the other kids and start jumping around and things" and that there were three other children on the bed at the time. 20. M said that the Appellant's penis had gone into her mouth on two occasions, and the whole incident had lasted two to three minutes. When he took his penis out, he left the room. As to the kissing allegation that M had made approximately fifteen months earlier, she said in response to a leading question that that happened on the same day in a different room and the Appellant had kissed her on the cheek. 21. When M was cross-examined during the trial, she said that this occurred at 4pm

and that three other children were on the bed when it occurred, and fifteen children in total in the bedroom at the time. She said that when the Appellant pushed her head down on to his penis, the three other children were jumping on the bed and running around. She had not told anyone because she was scared about getting into trouble. 22. In his evidence at trial, the Appellant admitted going to the party but denied entering M's bedroom or assaulting her in the way described. 23. There was no significant independent relevant evidence, save for the evidence of an aunt of M that was unchallenged, to the effect that the Appellant was at one stage sitting on the top of the bunkbed near the ladder when M was at the other end of the bunkbed with two children in between M and the Appellant. The aunt said " They were throwing the pillows at each other on the bed. This was the first and only time that I saw them on the bed ". She said that after she had seen this happen, the Appellant left the bedroom with her and came downstairs. 24. One issue of concern to the Jurats was an admitted lie told by M. In her video interview on 21 November 2021, M said that after the 2020 incident the Appellant had told her not to tell anyone and sent her a message by telephone that night to the same effect. She later deleted that message. Two days later the police seized M's phone with a view to identifying whether it contained any evidence of the Appellant having sent her a message as she had asserted. An examination of her phone showed that it had only been active during 2021 and not at the time of the alleged offence. Police attended M's address to recover her previous phone. M said to the police that the message that she had spoken about was not sent by the Appellant but by a friend of hers. This disclosure led to a further ABE interview in May 2022, during which M said that the message she had received on her telephone had not come from the Appellant but from her friend who had the same name as the Appellant. 25. In October 2022, in her third ABE interview, M said that she had lied to the police when she had said that the message had come from her friend and not the Appellant, and that the Appellant had sent her a message but she was worried that if the police did not find it, that would make her look suspicious. She said the message in question was sent by the Appellant on her birthday, probably her tenth or eleventh, and she no longer had the message. At trial, it was agreed that neither phone owned by M contained material prior to February 2021, and the Crown accepted that M had lied when she said the message had come from her friend and her account in relation to the timing of any message from the Appellant had changed. 26. In her evidence, when she was cross-examined, M accepted that the Appellant had not sent any message about keeping the alleged 2020 incident secret. When she was re-examined, she said that the Appellant had never sent her a message about what had happened and only sent her a message wishing her a happy birthday. He had never sent her a message telling her not to tell anyone about what had happened. 27. Although not fatal to M's credibility, the Jurats were concerned that M had lied in the first place and then embellished the lie approximately a year later. 28. The Magistrate expressly took this matter into account. She noted at paragraph 7.25 that M had admitted that her account about a phone message from the Appellant was not true. She said: "In my view, this admission does not adversely affect my assessment of [her] evidence on the important points in this case. People lie for many reasons. In this case I accept that [M] lied because she feared she would not be believed. She tried to bolster her evidence with a

comment relating to a threat to keep quiet. This unravelled, and [M] openly admitted to the lie, she was not caught out. I found [M] to be a truthful and reliable witness whose account was supported by circumstantial evidence." 29. The Magistrate also said at paragraph 7.21: "I do not find that [M's] gradual disclosure of details of the allegations to the school then to the police in any way undermined her credibility as a witness, in fact I do not find it unusual that a child would give a teacher the briefest essential detail of an incident and give more details to the police later. Not all the details of the allegations were given at once, but all the accounts given by [her] were consistent." 30. She went on to say: "Although there are no eye witnesses to the alleged offences, [her] evidence as to the circumstances of each of the events was largely supported by other witnesses, not least the defendant himself." 31. The Jurats gave weight to these findings of the Magistrate and considered the evidence as a whole. The Jurats felt that such independent evidence as there was, namely from M's aunt, if anything undermined the evidence of M in relation to the 2016 allegation. They felt that the account that she gave in 2021 regarding the 2016 allegation was materially different from the account that she gave in 2023 and, indeed, parts of the first allegation made in 2021 were not repeated at all in 2023. Even though memories can develop over time, it was surprising that initially M was able to give an account about being kissed in 2016, but during subsequent extensive ABE interviews was not able to give any account as to the major part of the incident which she subsequently said she could recall. Although sexual offences can take place in all sorts of circumstances, the Jurats found it difficult to accept that the allegation occurred in the company of fifteen children playing in a room, three of whom were, it seems, having a pillow fight on the bed, at the same time as the alleged assault occurred. The Magistrate gave weight to the admitted lie but the Jurats thought that the untruths in question were both elaborate and deliberate and in the circumstances, having regard to the evidence as a whole, were satisfied that there was insufficient evidence for the Magistrate to have convicted the Appellant in relation to the 2016 allegation. The appeal against conviction in respect of the 2020 allegation was allowed. The 2020 allegation 32. As noted at paragraph 17 above, the first disclosure was made on 15 October 2021. M took part in a survey at school on 15 October 2021 and after the survey she asked to speak to the school safeguarding coordinator. She disclosed that she had been inappropriately touched by the Appellant. The note of what she says records that when she was eleven years old, just before she started secondary school, she was at a sleepover at her aunt's apartment. She and her brother were "topping and tailing" while the Appellant was sleeping on the sofa. The Appellant leant over and touched her on her waist and asked her to sleep on the sofa with him. She said "no" and asked her brother to move closer to the sofa. She said that she had not told her mother or anyone else. 33. M's ABE interview took place on 21 November 2021. M said more about the sleepover at her aunt's apartment. She said that she and her brother were staying there but she did not know that the Appellant was going to be there. She said that she was sleeping between her brother on the mattress on the lounge floor and the Appellant who was on the sofa asked her to go and join him on the sofa. M refused. She said she then fell asleep and she woke to find the Appellant touching her. She said the Appellant was touching her on her waist with his hands. She was wearing pyjamas. He put his hand

down her pyjamas and touched her vagina on the top. 34. M slapped the Appellant's arm and told him to stop. Initially he kept going. She then asked her brother to switch with her which he did. M said that she thought the Appellant was about sixteen at the time, and that the incident happened in approximately August 2020. M would have been eleven at the time and the Appellant would have been about sixteen. Her brother had not seen what had occurred because he was asleep. M felt uncomfortable about what the Appellant had done. The Appellant remained on the sofa when he was touching M. She said she wanted to run into her aunt's room and tell her but she felt that she could not. During the same interview, M went on to say that the Appellant had messaged her on her phone and told her not to tell someone - the falsehood referred to above. She made a sketch drawing showing where the Appellant, herself and her brother were sleeping. 35. In her third ABE on 7 October 2022, she agreed that she had lied about the text communication with the Appellant, but said that this was the only thing that she had lied about. When the Appellant was interviewed on 28 January 2022 regarding the 2020 allegation, he agreed that there had been a sleepover at M's aunt's apartment in May 2020 when M and her brother had slept in the same room as him. He claimed that he slept on the floor with M's brother and that M slept alone on the sofa. He said that it was the only occasion on which they had been present overnight at a sleepover at M's aunt's apartment. He denied the allegation, and could not explain why M would have made it. 36. When M was cross-examined about the 2020 allegation at trial, the inconsistency between the first account she gave at school (at least as recorded on the note made by the school) and the account she gave to the police in her ABE a few weeks later was put to her. M explained that she felt rushed when she was talking to the safeguarding officer at school, and she insisted that the account she gave to the police was the truth. When she was re-examined by counsel for the Crown, she confirmed that she was sleeping closest to the Appellant when the assault occurred, but initially her brother was sleeping closest to the Appellant and she had wanted to lay next to the Appellant because he wanted to watch something on her phone. Then because of the Appellant touching her, she asked her brother to switch back. This was not wholly consistent with the account she gave to the police but, nonetheless, gave a picture of the sleeping arrangements as confirmed by the aunt which was consistent with what M said in her evidence taken as a whole, and not the account given by the Appellant either in interview or when he gave evidence at trial. 37. Important evidence was given by the aunt which was read to the Magistrate and unchallenged - as noted above in relation to the 2016 allegation. The aunt's first statement was made on 21 December 2021. She said the sleepover at her home took place in May 2020. She said that the Appellant was staying with her temporarily at the time as he had nowhere else to live. He would "always sleep on a sofa in the lounge". On the night in question, M came to stay with her little brother. They slept on cushions on the lounge floor with a duvet over them. The cushions were "up against the sofa". The aunt said that the arrangements were "set up so that they would all be sleeping in a row". When the aunt went to bed, the three youngsters were already in their beds, with the Appellant on the sofa and M on the bed on the floor between the Appellant and her brother. At some stage the aunt got up, she thought approximately an hour and a half after she had gone to bed, to tell the children to turn their

Playstation off. She said " When I went into the lounge, the three were still in their beds with [the Appellant] on the sofa, [M and her brother] had now switched places. I did not think anything of this at the time" . 38. She also took photographs just after midnight showing M and her brother in their made up beds on the floor. 39. This evidence is important as it supports M's case in relation to the sleeping arrangements and is undeniably correct, backed up as it is by photographic evidence as well as being unchallenged. It also undermines the Appellant's case that it was M that was sleeping on the sofa. 40. Although not relevant, we note that the aunt was permitted (in the sense that this part of her statement was not challenged) to give evidence about the Appellant behaving inappropriately at a party on 12 September 2022 with a girl who was not relevant to these proceedings. This was evidence that perhaps ought to have been objected to and not admitted, but in any event it is clear from the evidence of the Magistrate that she gave no weight to it. It appears from the transcript that that evidence was introduced at the request of the defence. 41. In evidence at trial, the Appellant said he recalled the sleepover at the aunt's house and repeated, in spite of the photographic evidence, that he had slept on the floor with the brother. He said that M had slept on the sofa, notwithstanding the unchallenged evidence of the aunt. He denied any indecency and said that M was lying. He also said through the interpreter that he understood most of the questions he was being asked in English, but he could not speak English fluently. He accepted that the photographs that the aunt exhibited were from 19 May 2020, which was the only time there was a sleepover with M and her brother. He agreed the photograph showed M and her brother lying on a made-up bed on the floor and M next to the sofa. The Appellant rejected the evidence given by the aunt that he slept on the sofa - insisting that he slept on the floor with M's brother. 42. The Appellant went on to say that he thought that M was making allegations because her mother did not like him. He accepted that he had sent M a happy birthday message on 28 February 2021 and she had written back saying ' thank you ' by text. 43. The Magistrate summarised the evidence in relation to the 2020 allegation correctly, and also took into account the evidence of the untruths told by M in relation to text messages referred to above. She said she found M's mother to be a reliable witness and that there was no credible reason put to her as to why she might persuade her young daughter to lie to the police, and noted that the mother appeared to be " genuinely upset at this suggestion ". 44. In the Magistrate's assessment, the Appellant, whose evidence she summarised, was an untruthful and unreliable witness. The Magistrate said that there were many reasons why a witness might be untruthful and that she had considered them, but in this case " the only reasonable explanation is that the [Appellant] seeks to avoid responsibility for his sexual acts towards [M]" . 45. Various criticisms were made of M's account. In our view, the fact that M's complaint made to the school was articulated in greater detail and in different terms during her ABE is not unusual in cases of this nature. Indeed, it is what usually happens. Minor inconsistencies in her account, such as in respect of what she was wearing when she was assaulted, were in our view of no significance. 46. The Appellant says that the lies that M told affect her credibility in relation to both allegations, and that these were accorded insufficient weight by the Magistrate. Whilst there is some force in this argument, the

evidence in support of the 2020 allegation was substantial and M was consistent. The Magistrate was entitled to prefer the evidence of M and reject the evidence of the Appellant, and the Jurats determined that there was sufficient evidence on which the Magistrate could properly have come to the decision that she did. Accordingly, the appeal against conviction in relation to the 2020 allegation was dismissed. Appeal against sentence 47. The Appellant was sentenced to three months youth custody in respect of the first offence, and twelve months youth custody concurrent in respect of the second offence. 48. Generally the Royal Court will only interfere with the sentence imposed by the Magistrate when it is: (i) Not justified by law; or (ii) Passed on the wrong factual basis; or (iii) Some matter improperly was taken into account or a fresh matter warrants consideration; or (iv) It is wrong in principle or manifestly excessive. 49. The Appellant correctly says, which the Crown had difficulty resisting, that in circumstances such as these where one conviction has been quashed sentencing must be considered afresh. Accordingly, in reconsidering sentence, we have not determined that the sentence imposed by the Magistrate was wrong in principle or manifestly excessive, or for any of the other reasons which might usually warrant interfering with a sentence imposed by the Magistrate on appeal. At paragraph 18 of her sentencing remarks, the Magistrate notes that the first offence was a " seriously aggravating feature " of the second offence. Accordingly, it is inevitable that the sentence imposed for the 2020 offence needs to be reconsidered. 50. We agree that the approach to sentencing for this offence, set out by the Magistrate at paragraph 15 of her judgment, was correct: "If the Defendant had been sentenced around May 2020 for the Article 13 offence, he would have been 16 years old. The Criminal Justice (Young Offenders) (Jersey) Law 2014 ['the 2014 Law'] was in force at the time. The Defendant would have been classed as a 'young person' under the 2014 Law. The maximum sentence under Article 13 of the 2018 Law was five years' custody in 2020 and remains the same. The provisions of Article 5 (4) of the 2014 Law would not therefore have applied to the Defendant in respect of this offence. As the Defendant was then aged 16 he would have been liable to youth detention under Article 4 of the 2014 if the sentencing court had been satisfied that the terms of Article 4(b) (i), (ii) or (iii) were met. The maximum sentence available would have been 12 months' youth detention in accordance with Article 4(6). That maximum sentence has not changed since 2020." 51. As to the seriousness of the offence, the Magistrate made the following observation at paragraph 17: "The Article 13 offence was committed when the Defendant was still a young person, and his level of culpability is not that of an adult. However, being 16 is very different to being 12. The Defendant would have been fully grown and sexually mature at 16. There is no evidence that the Defendant suffered any impairment that would affect his understanding of right and wrong. I am satisfied that at 16 and working in the adult world, he would have known that it was very wrong to touch an 11 year old sexually and intimately." 52. We agree with these remarks. We also agree with the observation made by the Magistrate at paragraph 22 of her judgment, that the 2020 offence was serious enough to warrant a custodial sentence, notwithstanding the provisions of the 2014 Law. The Appellant exploited the vulnerability of his much younger victim, touching her naked genitalia when she was sleeping at the home of a relative and should have been safe. 53. We have regard to the pre-sentence report and

note the Appellant continues to deny this offence, is at high risk of general reconviction and poses a moderate risk of sexual harm. 54. Although the recommendation is not binding on the Court in this (or any) case, we note that the pre-sentence report, notwithstanding the Appellant's denial of the offences, his 2021 youth court conviction for breach of the peace, malicious damage and common assault, for which he was sentenced to a nine month probation order and fifty hours of community service, both of which were completed successfully, and his August 2023 conviction before the Magistrate's Court for offences of breach of the peace to which he was sentenced to a twelve month binding over order, recommended community service and probation, the former as a direct alternative to custody and the latter an order which will include offence focused work including victim awareness and empathy work. 55. Owing to the circumstances of this conviction, and the fact that the Appellant had spent over two months in custody when the appeal was heard (equivalent to a sentence of three months youth detention), we found that the appropriate sentence that the Court should pass was a sentence equivalent to a sentence of nine months youth detention, reduced to take into account the time that the Appellant had already spent in custody. The Appellant's counsel said that custody had been a salutary experience for him. The sentence we imposed was 120 hours community service, equivalent to six months youth detention, and a probation order for two years. 56. As regards ancillary orders, we found that whilst Article 2(1)(a)(iv) of the Sex Offenders (Jersey) Law 2010 ("the 2010 Law") excludes Article 13 of the 2018 Law from the designation of a relevant offence, we were satisfied that this was sexually aggravated offence for the purposes of Article 3(4) of the 2010 Law. The contents of the pre-sentence report, in particular the assessment of the Appellant's risk of sexual harm to the public, the evidence in this case, his denials and lack of remorse, were sufficient for the Court to certify that this was a sexually aggravated offence. Accordingly, the offence attracts the notification requirements under the Law and we ordered that five years must elapse before an application may be made by the Appellant to lift the notification requirements under the Law. 57. We also made a restraining order under Article 5 of the Crime (Disorderly Conduct and Harassment) (Jersey) Law 2008 for a period of five years in the terms sought by the Crown, preventing the Appellant from having any contact, direct or indirect, with M, approaching her or following her, or from entering into any premises known to be her home or loitering within a hundred metres thereof, or entering any premises known to be her place of education or loitering within a hundred metres thereof. 58. Finally, we needed to consider the question of deportation. We considered the test in *Camacho v AG*

[2007] JCA 145 . We agreed that in view of the Appellant's conviction his continued presence in the island is detrimental to the community. However, having regard to his age when the offence was committed, the fact that he has lived in Jersey for five years and that his mother, brothers and half-sister live here, on balance the Article 8 rights of the Appellant and his family were sufficient for the Court not to recommend his deportation. *Authorities McAdam v AG*

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