

JERSEY / JUDGMENT

# Le Pavoux -v- AG [2016]

## JRC 115 (05 July 2016)

[2016] JRC 115

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### JUDGMENT

THE BAILIFF: 1. The Court sat on 10 th March, 2016, to receive the Appellant's appeal against conviction and sentence, the Appellant having been found guilty on 10 th December, 2015, and sentenced on 4 th January, 2016, as set out below:- (i) Breach of the peace on 30 th September, 2015 - 1 week's imprisonment; (ii) Common assault on 15 th October, 2015

- 10 weeks' imprisonment, consecutive; (iii) Common assault on 16 th October, 2015

- 20 weeks' imprisonment, consecutive; (iv) Common assault on 18 th October, 2015

- 8 weeks' imprisonment, consecutive; (v) Breach of a binding over order - 1 week's imprisonment, concurrent; and (vi) Failure to pay outstanding fines - 12 days' imprisonment, consecutive. 2. The hearing was conducted before the Relief Magistrate Mrs Baker, who stated the sentence to be a total of 42 weeks' and 5 days. It appears this was an error, because the amount in total was 40 weeks and 5 days. In relation to the appeal against conviction on the charges of common assault listed at sub-paragraphs (ii), (iii) and (iv) of paragraph 1 above, the Appellant contended that the Relief Magistrate reached decisions that were not supported by the evidence and that there was a miscarriage of justice arising from the conduct of the trial by the Appellant's then legal representative. As to sentence, it was said that this was manifestly excessive and/or wrong in principle. 3. The Appellant was arrested on Monday 19 th October, 2015, and presented in the Magistrate's Court the following day, and was remanded in custody. The appeal was originally to have been heard on 25 th February, but a misunderstanding as to whether Advocate Fitz, who was to be available to give evidence in relation to her conduct of the trial before the Relief Magistrate, was available, the appeal had to be adjourned, Advocate Fitz being out of the Island on that day. The Court granted the Appellant bail on 25 th February having regard to the fact that the release date would have been 5 th May if both appeals had failed, the Court also being concerned that the delay in dealing with the Appellant's appeal was not in any sense his fault. 4. At the hearing on 10 th March, the Court allowed the appeal against conviction in relation to charges 2 and 3 (paragraph 1(iii) and (iv) above) but refused the appeal in relation to charge 1 (paragraph 1(ii)). That decision meant that the appeal against sentence was otiose, time having been served. Reasons were reserved and this judgment sets out those

reasons. 5. The three relevant charges in question were framed as follows:- "1. On 15th October 2015 at the premises known as Flat 6, Block 3, St Mark's Crescent, St Mark's Road in the Parish of St Helier, Paul Anthony Le Pavoux assaulted [the complainant].

2. On 16th October 2015 at the premises known as Flat 6, Block 3, St Mark's Crescent, St Mark's Road in the Parish of St Helier, Paul Anthony Le Pavoux assaulted [the complainant].

3. On 18th October 2015 at the premises known as Flat 6, Block 3, St Mark's Crescent, St Mark's Road in the Parish of St Helier, Paul Anthony Le Pavoux assaulted [the complainant]." 6. Admissions were made by the Appellant pursuant to Article 3 of the Criminal Justice (Evidence and Procedure) (Jersey) Law 1998 as to:- (i) The complainant's address. (ii) The defendant visiting the complainant at that address on the dates in question. (iii) Photographs of the complainant by the crime scene investigator at 3pm on Monday 19th October, those photographs being agreed and exhibited. (iv) The interview of the defendant on Monday 19th October at Rouge Bouillon Police Station and when he exercised his right to provide no comment answers. (v) The continuity, provenance, authenticity and admissibility of all documentary and other exhibits. 7. The Relief Magistrate indeed noted that most of the evidence had been agreed. She further noted that the only live evidence was that of the complainant and that of the Appellant. They were the only people present at the time of the three alleged incidents. The Relief Magistrate correctly directed herself that it was not for the Appellant to prove anything to her. He needed to do no more than put the prosecution to proof. He had no need to give evidence himself if he did not wish to do so, although he had in fact given evidence. The Relief Magistrate looked at all the evidence to see whether it undermined or supported the account of either the complainant or the Appellant. She considered some character references that had been put in to support the Appellant and she resolved that they did not in fact support him and she gave no weight to them. She noted that the Appellant had no convictions for violence, but she considered that she should ask herself whether, just because he had never been convicted of violence, that necessarily meant that the complainant was making up all of the allegations and that he did not commit any of the assaults. 8. The Relief Magistrate then reviewed the evidence of the complainant which she noted had been given "in a most determined manner". She talked of how she was in love with Mr Le Pavoux. Even if they had fallen out, he knew that, if he turned up after an incident with drink and drugs, she would let him in, the reason for that being that it was drink and drugs at that time that were driving her. She said that, with the help of family and friends and counselling, she had now gained the strength to talk about the violence that she had suffered from Mr Le Pavoux. She accepted that she was drunk a lot of the time and that she could mix up dates, but that she was adamant that the assaults did indeed occur. 9. The Relief Magistrate then reviewed the medical evidence and the evidence of the police officer who saw the complainant in a drunken state on 18th October. Ultimately the Relief Magistrate considered the complainant's evidence to be measured and that the Appellant was not a credible witness at all who, in her view, did not give her a balanced or truthful explanation of what had happened on the three occasions in question. The Relief Magistrate concluded:- "I find as a fact that the bruising to the knee and shin, the cut to the septum and

the finger bruising to the arms all occurred as a direct result of Mr Le Pavoux intentionally striking [the complainant] with hostility, in that he kicked her, he held on to her with force, he bit her, cutting through her nose, and he pushed her. On the first charge, I also find further as a fact that he referred to [the complainant] as an 'ungrateful cunt' and that he told her to 'fuck off' and he would 'find someone else to fuck'. I consider that that is degrading and controlling behaviour. I find him guilty on all three counts." 10. At the time of sentence on 4 th January, the Relief Magistrate described the assaults in this way:- "The assaults involved the deliberate kicking, with considerable force, aiming deliberately the blows at her knee and shin. You had your shoes on. She suffered pain and discomfort and bruising. You held on to her face in an aggressive manner and you bit her on the nose, using your teeth as a weapon. That caused bleeding and redness. On the third occasion, the 18th, you pushed her over with considerable force, again causing her pain and discomfort. I consider that [the complainant] was vulnerable at the time. She had clearly had difficulties with alcohol and drugs, and yet you displayed manipulative behaviour towards her by plying her with drink and drugs so that she allowed you to stay in a relationship with you [sic]." 11. The first ground of appeal is that the Magistrate had insufficient evidence to convict. The second ground of appeal is that there was a miscarriage of justice because the Appellant was not adequately advised or represented by Messrs Ogier, which resulted in his case not being presented as it should have been and, as a result, rendered his convictions unsafe. 12. We deal with the first ground of appeal, namely that there was no evidence sufficient for the Relief Magistrate to convict. Charge 1 13. On 30 th September, 2015, a breach of the peace was committed by the Appellant outside the property which he shared with the complainant. He was remanded on conditional bail, the condition being that he should not attend at the complainant's property, which they had shared, and that he should have no contact with her. On 19 th October, PC Fernandes attended at the complainant's address at approximately 11.30am. In breach of his bail conditions, the Appellant was found on the premises. He was in fact hiding in a large clothes cupboard at the top of the stairs. He was arrested and cautioned on suspicion of common assault and he replied to the effect of "assault on who?". PC Davis, who accompanied PC Fernandes that day, gave evidence that when he saw the complainant, she was shaking and was frightened at the prospect of being seen by Le Pavoux while she was talking to the police. She was extremely nervous and he noticed redness on the bridge of her nose - when he asked her what had happened she said "nothing". 14. There was also police evidence of an attendance on the complainant on Sunday 18 th October. The police arrived during the evening of Sunday 18 th and were met at the complainant's premises by her and a friend of hers. It was clear that the complainant was heavily intoxicated - she had very slurred speech and was unable to stand straight without having to prop herself up. She also smelt highly of intoxicants. She appeared to be incoherent. She showed the officers a large number of bruises on her arms and told them that these bruises were from "tonight's incident" where she said she had been assaulted by the defendant. She was unable to give details of which bruises were fresh and which were not and the officers could see that one scratch had a scab. The complainant stated that this injury also had happened that evening. She asserted that she had been bitten on the nose by

the defendant, but the officers could not see any physical injuries to her nose or blood around it. The complainant's friend tried to assist with details of the incident, but the complainant herself appeared reluctant to give details because, in the view of the police officers, she was clearly drunk. She agreed, however, to attend at the police station in the morning when she had sobered up. 15. While the police officers were speaking to the complainant's friend in the kitchen, the complainant went to use the bathroom. They heard a loud bang from there and the complainant emerged, admitting she had fallen off the toilet. She was unable to walk due to her drunkenness and she gave the officers an incorrect home address. 16. One of the officers used his body-worn camera to capture the bruises on the complainant's arms. The pictures taken were put in evidence. 17. Also in evidence was the statement of Dr Deryn Evans dated 21 st October. Dr Evans had seen the complainant on 19 th October, the examination starting at 3pm. The examination took place in the presence of the complainant's friend. The complainant told the doctor that, during the previous four days, her partner had pulled her hair, kicked her, bitten her, pushed her, sat on her and punched the side of her head. She complained of right upper-arm pain due to scratches, right knee pain and a sore nose. She said that prior to the events of the past four days, she had had "a few bruises". The complainant said that she suffered from depression and anxiety and was addicted to subutex and valium. She described her sleep and appetite as poor and she felt her anxiety was worse. She had deliberately self-harmed in the past. 18. The doctor made a note of the marks and bruises which she had seen, amongst which was an approximate 4mm wound on the right side of the central septum of the complainant's nose. The doctor took some photographs which were produced in evidence. A proper summary of the evidence of the doctor in her conclusion is this:- "[The complainant] had a wound on her nose that could be consistent with sharp forced trauma such as a bite. She had swelling on the right side of her head that could be consistent with blunt force trauma. She had multiple bruises over her arms, legs and trunk that could be consistent with blunt force trauma. The circular bruises could be consistent with finger pressure. She had a scratch on her right shoulder that could be consistent with sharp force trauma. She had scabbed areas on her knees that could be consistent with blunt force trauma." 19. In subsequent answers given to questions put to her, the doctor said this:- "She had an approximately 4mm wound on the right side of the central septum of her nose. The wound is suggestive of sharp force trauma. The wound is very small and consistent with contact with a sharp edge, glass, fingernail or tooth. It is however difficult to differentiate between the tear and an incision in such a small wound. [The complainant's] injuries being documented as blunt force injuries could be consistent with any blunt force trauma such as falls, knocks, punches or slaps. The circular bruises referred to in the conclusion of my report could be due to blunt force trauma due to a circular shaped object. I concluded that they could be consistent with finger pressure due to the distribution and location of the bruises on [the complainant's] body. Dating injuries, especially bruises, is difficult. Studies have shown that bruises that have yellow colouring are likely to have been sustained more than 18 hours ago." 20. A review of the detail of the doctor's report shows that there were approximately 45 wounds or bruises described. Most were described as grey/brown or yellow - in particular, the bruise to the front of the right

shin was described as yellow/grey. The only red bruises (the most recent) were to the right arm, the back of the left arm and a small bruise on the edge of the left knee. 21. When the complainant came to give evidence of the events of 15 th October, the subject of charge 1, she agreed that she had had an alcohol problem. She said she was a recovering alcoholic, and that she had drunk alcohol on 15 th October. She said that she and the defendant had argued and she thought it was that day that he called her an "ungrateful cunt" and kicked her on the leg while she was sitting on the sofa. She said she was not sure precisely what day it was. The kick was administered to the right leg. There were clearly several kicks because she pointed to bruising underneath her right knee and on the left hand side of it. 22. In cross-examination the complainant described the assault as the defendant kicking her with his heel. He was wearing Nike shoes or trainers and he kicked her once. When she was asked what the other bruises were on her leg, she said they were not actually bruises but were the result of mosquito bites. 23. That was for practical purposes the extent of the prosecution evidence on charge 1. When he gave evidence, the defendant described how he had gone out to the supermarket to buy food on the afternoon of 15 th October. When he returned they argued and he left her flat. He denied kicking the complainant and said he had not touched her. In cross-examination, he maintained that denial and he described the complainant's evidence as totally untrue. 24. The complainant's evidence was supported by the medical evidence of a grey/red bruise on the outer side of the right knee, and a yellow/grey bruise on the front of the right shin. The fact that these bruises were not red bruises suggests that they resulted from a blunt force trauma some days before the examination which took place on 19 th October. The Relief Magistrate had the advantage of seeing the witnesses give their evidence, which we have not. We consider she was entitled to reach the conclusion she did, and the finding in relation to charge 1 on the Indictment is not perverse. We shall go on to consider shortly the appeal against conviction on this count on the basis of the defence case not being adequately put, but in relation to the allegation that there was insufficient evidence to justify conviction, that is a submission which we reject. Charges 2 and 3 25. The prosecution case was that on Friday 16 th October the defendant returned to the complainant's address on the morning of 16 th October. She complained about what had happened to her leg, which she said was sore. They had a further argument, following which he left. She then met him in New Street and after collecting a prescription, they went to get a pizza. They had a further argument, and then went back to the complainant's address where, the complainant said, he pulled her to him and bit her in the face. Her exact words were "He grabbed, he grabbed my face and then umm bit me on the nose and then walked, walked down, walked away ... and just said 'Fuck you then, I'll go and fuck someone else if you won't give it to me'". The complainant said she had not drunk very much that Friday morning and it was one of the more sober times. 26. As to charge 3, the complainant's evidence was that the defendant visited her at her address during the evening of Sunday 18 th October. He was there for about an hour. The complainant said that they had a big argument, and that the defendant pushed her into a glass coffee table which was smashed. 27. In cross-examination, a police report was put to the complainant in relation to an alleged incident on 1 st October. The report contained a statement that the complainant told the

police officer that she had tipped over the coffee table a couple of days before. As at 1 st October, she told the police that the defendant did not have a violent streak. She agreed that on 18 th October she had told the police officers that she could not remember what had happened because she was very confused, but at the time of giving evidence she said that she could remember because she had had the time to think about everything which had gone on. She agreed that during the evening of 18 th October during a comfort break, when the police were interviewing her, she had fallen off the toilet. She also agreed that she was so drunk she could not even walk with the police officers from her friend's address to her own, next door. She agreed she had had a drink problem for quite a while and indeed had attended Silkworth Lodge since she was 21. She was pressed about how the defendant could have bitten her where she said he did without causing a counterpart bite with his upper or lower teeth as the case might be, but she had no explanation. She was sure that took place on the Sunday. 28. When the defendant gave his evidence, he denied both the charges. He agreed that he had had an argument with the complainant following a chance meeting between the two of them and the complainant's friend, who he described as a person who had been convicted for violent offences and who intimidated the complainant. He described how the complainant was often drunk, and that she tended to fall over and knock into things like chests of drawers. He agreed that he might have told the complainant that he was going to "fuck off and find someone else to fuck" but he denied that he had said so on any of these three occasions. In cross-examination he was asked about the bite on the nose. He said that he thought that the complainant had probably had a cold sore and that this was not a cut or trauma of whatever kind. He denied biting her on the nose, denied pulling her hair or grabbing her face. 29. We accept that the Relief Magistrate was presented with a picture of domestic abuse and that she accepted that the complainant was credible in her evidence in that context. It is also clear that the Relief Magistrate rejected the evidence of the defendant. She had reached that conclusion in relation to the first charge. Nonetheless it was the Relief Magistrate's obligation, even though the evidence of the defendant had been rejected, to consider whether the prosecution had still proved its case in relation to the specific charges put. The standard direction in the Royal Court a jury when considering explanations given by a defendant are that if the jury thinks that the explanation is true or might be true, it is the duty of the jury to acquit - but even if the jury thinks the explanation of the defendant is untrue, it must still go on to consider whether there is other sufficient evidence adduced by the Crown to prove its case. We have looked at the evidence on charges 2 and 3 against the background that the defendant's explanation was rejected, and we have still found it impossible to reach the conclusion that the prosecution proved its case. 30. This is most obvious in the case of the second count on the Indictment. The allegation of this assault was of a bite to the nose. We would take the view that it is simply not possible for the defendant to have bitten the complainant in such a way as to cause the injury complained of without having a counterpart bite with either the top or bottom teeth as the case may be, leaving a mark of some kind - but we do not have to go that far. The question is whether there was sufficient evidence on which the Relief Magistrate could be sure that this injury was caused by a bite delivered by the defendant. In our judgment, the medical evidence does not

conclusively support the evidence of the complainant - far from it for the reason we have given. We note also that if there had been a bite of this kind, we would have expected there to be other injuries apparent to the police when they saw the complainant on the 18 th October, but there were none. 31. As to the third charge, it is clear that the complainant gave evidence of an incident which took place on 1 st October and not 18 th October, and yet she was adamant that the incident had occurred on 18 th October. On the other hand, when she was interviewed by the police on 1 st October, she gave a completely different account. We do not find it possible to say that there was reliable evidence on which the Relief Magistrate could rely to conclude to the criminal standard that the offence took place as charged. It was contended by Crown Advocate Hall that the victim said three times that she was pushed into a coffee table, and that there must have been two table incidents - but it is apparent that the coffee table was said to have been broken on 1 st October, and that explanation does not thus seem to stand up to the rest of the evidence. There is also the further difficulty when the police saw the complainant on 18 th October, she was clearly unable to remember anything significant as a result of her drunken state. We accept the contention of Advocate Preston that in essence the evidence on this charge was so vague that it cannot reasonably be taken to support a conviction. 32. Accordingly, the convictions on charges 2 and 3 were set aside. The conduct of the trial 33. The second ground of appeal advanced by Advocate Preston was that there had been a miscarriage of justice as a result of the decisions taken by Messrs Ogier before the trial and Advocate Fitz who represented the Appellant at trial. This ground of appeal is only relevant to the first of the three convictions against which an appeal has been made, as a result of our findings in relation to the convictions on charges two and three. 34. The nature of the Appellant's defence was that he had not assaulted the complainant at any time, but rather that the complainant had colluded with her friend to make up complaints to get him into trouble. It was, he said, the complainant who was violent towards him, particularly when he ever made an effort to leave her. He said she was an alcoholic with a medical condition which caused her to bruise easily and her frequent drunkenness caused her to fall over or knock into things so that she was often very extensively bruised. 35. It is important to record that Advocate Preston, on behalf of the Appellant, makes no suggestion of bad faith on the part of Advocate Fitz or indeed of anyone else at Ogier. His criticisms however are as follows:- (i) Advocate Fitz failed to put the defendant's case properly or at all and/or the approach adopted to his case failed to take advantage of the points in his favour and/or take advantage of the inherent weakness in the prosecution case. (ii) Advocate Fitz appeared to follow her own case theory and the Appellant simply had to go along with what she said. This had the same effect as if the Appellant had not been consulted. 36. Insofar as there was an assertion of an unfair process before the Magistrate's Court, the Appellant also complained about the involvement of the Magistrate, Mrs Shaw, in the pre-trial review hearings. The essence of this complaint was that the Magistrate had already identified a conflict in her sitting as Magistrate. This conflict extended also to the Assistant Magistrate and the other Relief Magistrates. Nonetheless it was said that the Magistrate had taken an active role in the two pre-trial review hearings, criticising the defendant for delays in progressing the matter, notwithstanding that only a

month had passed since the alleged incidents. The directions which the Magistrate gave were not challenged despite, according to the defendant, her apparently descending into the substance of the case, expressing a view with regard to the proposed application for the complainant's medical records. 37. In our view there is no merit in the criticisms of the Magistrate. She had quite properly made arrangements for a Relief Magistrate to be sworn in order to hear the case in question, for reasons into which it is unnecessary to go for the purposes of this judgment. The Relief Magistrate appointed was not resident in the island and it was inevitable that from time to time administrative arrangements might come to be reviewed by the court. Of course, given the identified conflict, the Magistrate had to be careful to avoid making substantive orders on the case itself. We think she was careful to do so and having looked at what took place, we do not think that any of these proceedings were prejudicial to the Appellant. There was nothing preventing the matters which were canvassed in the pre-trial hearings from being taken forward with the Relief Magistrate should the Appellant or his counsel have wished to do so. 38. The complaints against Messrs Ogier and / or Advocate Fitz really amounted to the following:- (i) No application was maintained for a copy of the complainant's medical records. The absence of any medical explanation for the bruises on the complainant's body lent credence to her evidence that, it was said, could have been addressed if the records had shown that she suffered from a medical condition that led her to bruise easily. (ii) It was said that Advocate Fitz, wrongly, had taken the decision not to cross-examine Dr Evans, who had examined the complainant. This meant that it was not possible to explore the complainant's susceptibility to bruise easily, and also that in practice it was not possible to consider in detail the mechanics of the alleged bite to the nose and the other possible explanations, in particular the explanation with regard to cold sores. (iii) It was said that Advocate Fitz failed to cross-examine adequately the complainant, particularly with regard to the cold sore condition - and had this evidence been undermined, it would also have affected the evidence in relation to the other charges. (iv) It was said that Advocate Fitz did not seek to cross-examine PC Ray whose evidence was that he could not see any physical injuries to the complainant's nose or blood surrounding it when he attended upon her on 18 th October - nor did Advocate Fitz seek to obtain the body cam evidence and show it to the court. (v) It was said by Advocate Preston that Advocate Fitz wrongly allowed the previous convictions of the Appellant to be admitted into evidence. The result of introducing that evidence was to enable character references to be put in, all of which were given no weight at all by the Relief Magistrate. It was said by Advocate Preston that the consequence of this course of action enabled the prosecution to rely on the fact that the Appellant had breached his bail, which was very prejudicial to his case. 39. The test which an Appellate Court should apply in circumstances such as these in relation to appeals from the Royal Court was set out by the Court of Appeal in *Bennett v AG*

[2015] JCA 019 where Perry J A said this:- "4. Before we turn to consider the issues that arise for determination in this application, it may be helpful at this stage to say something about appeals based on the conduct of lawyers. There is no doubt that an error, or errors, on the part of an advocate may lead to the quashing of a conviction, provided that the error has

resulted in a miscarriage of justice (to use the language of the Court of Appeal) (Jersey) Law 1961. A number of formulations of the test for determining whether an advocates' conduct is sufficient to lead to the quashing of a conviction can be found in the authorities. In *R v Ensor*

[1989] 2 ALL ER 586 it was suggested that the advocate's conduct must be 'flagrantly incompetent', while in *R v Richards*

[2000] ALL ER(d) it was suggested that the test to be applied in relation to the conduct of the lawyer was 'Wednesbury unreasonableness', a reference to the decision in *Associated Provincial Picturehouses Limited v Wensbury Corporation*

[1948] 1 KB 223 . In *R v Clinton*

[1993] 2 ALL ER 998, the English Court of Appeal (Steyn LJ, Garland and Roush JJ) recognised the difficulties associated with such tests and stressed that what mattered was not the extent or quality of the advocate's error, but whether the conduct affected the safety of the conviction. To put this another way, the issue is whether the conduct of the lawyer has rendered the trial unfair; see *Boodran v State of Trinidad and Tobago*

[2002] 1 CR App R 103. Transposed to this jurisdiction, it would be necessary to consider whether the advocate's error was such as to have led to a miscarriage of justice. In *Clinton* , supra, it was stated that if the decision of an advocate is taken in good faith, having weighed the competing considerations and having consulted his client when appropriate, the Court of Appeal is much less likely to interfere than where the decision is taken in defiance of instructions and without reference to the court. 5. The procedure to be followed by legal representatives when dealing with an appeal involving criticism of counsel is well established. In short, the convicted defendant is required to waive legal professional privilege and the advocate whose conduct is the subject of criticism is entitled to have notice of that criticism and respond to it without being impeded or hampered by considerations of client confidentiality. In *R v Achogbuo*

[2014] 2 CR AP 94 (7) Thomas LJ stated (at paragraph 16):- 'Before applications are made to [the Court of Appeal] alleging incompetent representation which is based upon an account given by a convicted criminal, we expect lawyers to take proper steps to ascertain by independent means, including contacting the previous lawyers, as to whether there is any objective and independent basis for the grounds of appeal'.

7. We respectfully agree with those observations and would expect the same process of careful consideration to be followed in this jurisdiction." 40. Although the provisions in the Magistrate's Court (Miscellaneous Provisions)(Jersey) Law 1949 relating to appeals from the Magistrate's Court to the Royal Court are not expressed in the same way as the appeals to the Court of Appeal under the Court of Appeal (Jersey) Law 1961 , we consider that the approach which has been adumbrated by the Court of Appeal in *Bennett v AG* to be applicable to Magistrate's Court appeals as well. The questions we have to ask ourselves are firstly whether

we are satisfied there have been any advocate's errors, and secondly whether, if so, the result has led to a miscarriage of justice. 41. Advocate Fitz deposed an affidavit which was tendered to this court. In it she described the conduct of the defence of the Appellant, referring not only to the work which she conducted but also to the work done by other advocates at Messrs Ogier. In her affidavit she indicated that she did not think the application for medical records could be justified - the relevance of evidence must be considered in the light of the defence, and as the Appellant's defence had been based upon his being present but not having assaulted the complainant, Advocate Fitz considered that whether she bruised easily or not was irrelevant. Advocate Fitz also said that in her view the Appellant had understood all the points that she made in the context of his defence and that he agreed with the approach which she proposed. It was only after conviction that he started to say that he had not been sure her approach was correct. She therefore denied that the Appellant was not properly consulted. 42. As to the complaint about the failure to call the doctor to be cross-examined, Advocate Fitz was of the view that the doctor had already accepted that the cut could have been caused by a fingernail rather than a tooth, and in those circumstances there was no real gain to be made from calling the doctor to give evidence. As to PC Ray, the prosecution evidence was in Advocate Fitz's view very helpful to the Appellant and it was not sensible to cross-examine on that helpful evidence. As to the body cam, the prosecution had decided not to use it, and Advocate Fitz did not consider it helpful as it did not show the underneath of the nose. It showed the same angle as the photograph which was taken after the injury was noted, but did not show the injury. 43. As to the complainant's dishonesty, Advocate Fitz considered that she had referred to it extensively in cross-examination and in closing, and therefore had more than done enough in that respect. 44. On the hearing of the appeal, Advocate Fitz gave evidence before us. She said that the complainant had accepted that the Appellant had not caused all the bruises, and that for a number of reasons it was relevant to limit the history of the relationship between the Appellant and the complainant - if this came out in the context of the evidence adduced, it would open the door to the complainant being able to say anything she liked about that relationship, which would not work to the Appellant's advantage. She did not think that the doctor would have missed the fact, if it was one, that the complainant had a cold sore, and therefore the risks in calling the doctor to give evidence exceeded the advantages in doing so, not least because the doctor had confirmed that the injury could have been caused by a tooth, or indeed by a finger. As far as bruising easily was concerned, the fact that the complainant bruised easily did not mean that the Appellant either had or had not caused them. In other words, the fact of easy bruising did not go to the cause of the bruising. Furthermore she did not know what the medical report would say, and as the defence was that the Appellant had never touched the complainant, the bruising capability did not appear to be very relevant. 45. In his submissions, Advocate Preston said that the medical evidence should have been looked into. Messrs Ogier should have made enquiries on behalf of Advocate Fitz, and she should have insisted that they did. The fact was that the complainant did blame the Appellant for nearly all the bruising she had sustained - on analysis of her evidence, that would appear to be right - and it was necessary to look for some evidence that might have been capable of supporting

a challenge to what the complainant said. 46. The Court has examined all the complaints which have been made. Some of them we feel we can reject immediately. Advocate Fitz is an extremely experienced advocate and it is clear she was not remotely intimidated by the Magistrate or by the Relief Magistrate in relation to the matters which arose. It is also clear to us that the decisions not to call Dr Evans for cross-examination and not to put the allegation of the cold sore to the complainant were perfectly legitimate decisions for a trial advocate to take. It is also the case that in relation to the record of the Appellant and of the complainant that there is no room for significant criticism. 47. As to the complaints about the failure to obtain the medical records of the complainant, we think that this is evidence which Messrs Ogier perhaps ought to have applied for. It would have been helpful to have something independent to deal with a witness who, at trial, came up with the complaint that the Appellant was always assaulting her, as might have been anticipated, and dealing with the number of bruises and providing an alternative explanation for them was potentially helpful. However we do not know even now what the evidence might have been and it seems to us to be impossible to say that that failure establishes that a miscarriage of justice took place. We were also of the view that it probably would have been helpful for the body cam record of PC Ray to have been put in evidence - it showed the involvement of the friend of the complainant and it showed the complainant to be very drunk, and thus would go to the credit of the complainant generally. 48. It is apparent therefore that we do not criticise the Appellant or Advocate Preston for raising these complaints on appeal. We emphasise that Advocate Fitz's conduct was certainly not flagrantly incompetent, nor does it fail for being *Wednesbury* unreasonable. The criticisms of Advocate Fitz's conduct of the Appellant's defence go nowhere near that standard; but we are reminded that this is not the test, and the test is whether or not the errors were such as to have led to a miscarriage of justice. 49. Having looked at the issue in the round, we are not satisfied that they did. At the end of the day, on Count 1, the Relief Magistrate was faced with one person's word against another. In the event she found the complainant to be a convincing witness and the Appellant to be an unconvincing witness and accordingly, as we have found, there was sufficient evidence upon which she could reasonably convict. We do not consider that the complaints which Advocate Preston makes of Advocate Fitz's conduct of the defence, to the extent that we have found them valid, would have made any difference to the outcome of the case before the Relief Magistrate and in those circumstances we are satisfied that there was no miscarriage of justice. For this reason the Appellant's appeal against the conviction on Count 1 is rejected on this second ground as well. 50. Time having been served in relation to the sentence imposed on Count 1, the appeal against sentence became otiose and was not presented. 51. For these reasons the Appellant's appeal was allowed in relation to Charges 2 and 3 and the conviction on Charge 1 stood. The Crown was ordered to pay two thirds of the Appellant's costs in the Royal Court and below. *Authorities Criminal Justice (Evidence and Procedure) (Jersey) Law 1998. Bennett v AG*

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