

JERSEY / JUDGMENT

Lisa Marie Farrington and Laurence Munks v The Attorney General

COURT

Magistrate's Court Appeal - outraging public
decency - reasons for

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Magistrate's Court Appeal - outraging public decency - reasons for
dismissing the appeal

[2024]JRC229

Royal Court

(Samedi)

30 October 2024

Before :

Sir Michael Birt, Esq., Commissioner, and

Jurats Dulake and Entwistle

Lisa Marie Farrington

Laurence Munks

-v-

The Attorney General

The Appellants appeared on their own behalf.

Advocate K. A. Ridley for the Attorney

General.

JUDGMENT

THE COMMISSIONER: 1. This is an appeal against the conviction of the Appellants by the Magistrate on 29 April 2024 of an offence of outraging public decency by engaging in sexual intercourse within the view of members of the public. Although the Appellants were represented respectively by Advocate Robinson and Advocate Mière before the Magistrate's Court, they represented themselves on this appeal. 2. At the conclusion of the hearing on 24 September 2024, the Court announced that the appeal was dismissed. What follows constitutes the Court's reasons for that decision. The evidence before the Magistrate 3. Certain matters were not in dispute before the Magistrate. The Appellants are in a long-standing relationship and live together. On 3 September 2023 they spent the day together and had been drinking alcohol. In the early part of the evening they engaged in sexual intercourse on the balcony of a flat ("the flat") off La Route de St Aubin ("the road") but had been asked to leave the flat by a Mr Glover, manager of the block of

flats, because they were not residents of the flat. 4. They then moved to the steps which lead from the road down to West Park. The steps are next to the first house on the left hand side of the road when travelling from St Helier towards First Tower. The offence is alleged to have occurred at or near the top of the steps at about 8pm on 3 September. 5. The prosecution case relied on the evidence of three witnesses. The first was Mr Lombard, who lives in a house on the opposite side of the road from the steps. He said he was looking out of an upstairs window when he saw a man and a woman. The woman appeared to be very intoxicated and they appeared to be having sex on the steps with the man behind the woman. She was on her elbows and knees facing the road. They were having sex in what he called a “doggy position” for no longer than a minute. He was concerned about the woman being so intoxicated and called the police. The transcript of his telephone call was in evidence before the Magistrate. During the call he had also said that the man was having sex with the woman in a doggy position. He remained on the phone for a while after the police arrived. 6. In cross-examination, he accepted that, whereas he had said in his police statement that he was about 10 metres away, it was probably in the region of 20 to 25 metres. He also accepted that it was beginning to get dark. He said that he could not recall talking with any other witness in the case before making his statement to the police, which he did that evening; in particular he did not recall speaking to Mr Glover or Mr Sousa, a neighbour of the flat referred to earlier. Although he accepted that he could not be certain about what he had seen, he did not think that he was mistaken. 7. The other two witnesses were Ms Carla Freitas and her fiancé Mr Leo Perestrelo. They were walking along the road from St Helier towards First Tower and were on the pavement on the left hand side of the road nearest the steps. They were each looking at their phones. 8. Ms Freitas said that there came a time when Mr Perestrelo told her to look up. She did so and saw a male and a female having sex at the top of the steps. She described the man as standing behind the female and moving his hips back and forth. She accepted that she only took a couple of quick glances and carried on walking towards First Tower but said she was sure that they were having sex, although she did not see any genitalia. 9. The third witness was Mr Perestrelo. He said that he was looking at a football match on his phone when he heard moans which caused him to look up. He then saw a man and a woman “in the act” near the top of the steps. The moans which he heard were moans of pleasure coming from the woman. She was bent over near the top step and the man was standing behind her thrusting back and forth from behind. He could see the woman’s glutes and the man’s thighs. He said that they were having sex and he did not accept that there was any possibility of his being mistaken. He did not accept the suggestion from the defence that they were just larking around and that the man was squeezing a spot on the woman’s back. He was about 3 to 5 metres away from them as he was walking past.

10. The police arrived promptly as a result of Mr Lombard’s telephone call. The Appellants were arrested at the scene and were subsequently interviewed. The First Appellant was not interviewed until the next morning as a result of her state of intoxication. Essentially, she said that she could not remember anything after she and the Second Appellant were requested to leave the flat; she just had a total blank, although she thought it very unlikely that they would have had sex on the steps as it was not the sort of thing they would do.

11. Her defence statement was in somewhat different terms. She said that they were waiting to be picked up at the top of the steps and the Second Appellant had come up behind her and jokingly sexually bumped her. They did not have sex. She had a sore rash on her back and the Second Appellant had squeezed part of the rash in order to relieve the itching.
12. In her evidence before the Magistrate, the First Appellant denied having sexual intercourse on the steps. She explained that there were medical reasons why she could not have spur of the moment sex in such circumstances. Furthermore, as they had had sexual intercourse in the flat only shortly before, this would have diminished the ability of the Second Appellant to engage in sexual intercourse again, particularly when coupled with the fact that he had been drinking. She said that she was changing her shoes when the Second Appellant had squeezed her rash. She made a noise which might have drawn the attention of Ms Freitas and Mr Perestrelo. She also said that she might have “cheekily stuck my bum out” when changing her shoes. When questioned about the fact that, at her interview she had said she could not remember anything, she said that she was in shock at that time and had only had 20 minutes sleep at the police station. She was then questioned by Advocate Ridley in connection with the custody record which showed that in fact she had been extremely intoxicated, had deliberately tried to flood her cell and had then slept for a period of some 4 hours, rather than the 20 minutes which she was alleging.
13. In his police interview, which took place at 01.48 on 4 September, the Second Appellant said that they had had sex in the flat but not on the steps. He did not recall any sort of sexual acts on the steps although he and the First Appellant were always very touchy feely. He said that maybe he was looking at the rash on the back of the First Appellant’s neck.
14. In his defence statement, the Second Appellant said that when the First Appellant bent over to change her shoes, he stood behind her and acted in a joking, flirty way, but they were both fully clothed. He also spent some time looking at a rash on the back of the First Appellant’s neck.
15. In his oral evidence, the Second Appellant denied having sexual intercourse on the steps. He said that he was squeezing a spot on the rash on the First Appellant’s neck. His trousers were not down, he was wearing shorts. He said he could not have had sexual intercourse on the steps given certain medication he was taking and the fact that he and the First Appellant had had sexual intercourse at the flat only an hour or two earlier. In cross-examination, he admitted bumping and grinding against the First Appellant and he may have moved his hips forward and backward but he remained fully clothed. He accepted that the First Appellant’s dress might have ridden up so as to expose her glutes as described by Mr Perestrelo in his evidence.
16. In the judgment explaining her verdict, the Magistrate summarised the evidence of the prosecution and the defence and explained why she found the prosecution witnesses to be honest and reliable and why she did not find the Appellants to be reliable. She summarised her decision in the following terms: “I heard three independent witnesses who were, in my

view, honest and reliable who said they had seen both Defendants engaging in sexual intercourse in public. Two of the witnesses were very close to the Defendants and they passed by within a very short distance. They were sure of what they had seen and the witness further away was as sure as he could be. What he described was consistent with the nearer witnesses. So concerned was Mr Lombard that Miss Farrington was so intoxicated she might not have been able to have consented to the act that he called the police. Both Defendants gave evidence and I found them both to be unreliable. Their story about squeezing a spot was inherently unreliable and not believable. The accounts of the Defendants changed from their interviews to the Defence Case Statement to their evidence and particularly both of them said that there were medical reasons why it would have been impossible for them to engage in sexual intercourse. This was not in their Defence Case Statements. No medical evidence was called and the evidence could not be properly challenged. I drew adverse inferences from the inconsistencies between the Defence Case Statements of both Defendants and their evidence in court. The prosecution presented a strong case with three independent witnesses. The Defendants do not need to prove anything. But they have not weakened the prosecution case by their own evidence nor by cross-examination. I am satisfied beyond reasonable doubt that the Defendants engaged in sexual intercourse in a public place which would be, and was, seen by members of the public. This was a gross outrage of public decency and I find both Defendants guilty as charged.” Grounds of appeal

17. In order to put these in context, it is necessary to explain that the Appellants were originally charged with an additional offence of outraging public decency in relation to the admitted sexual intercourse on the balcony of the flat. Mr Sousa had secretly videoed this intercourse and, according to the Appellants, there is history between them and Mr Sousa such that they clearly do not get on; according to the First Appellant’s defence statement, he has a vendetta against her. However, the prosecution decided ultimately not to proceed with the charge in relation to the flat and accordingly, at trial, the Appellants only faced one charge.
18. The Appellants set out their grounds of appeal in the Notices of Appeal, which they prepared themselves, and in a narrative statement. In her contentions on behalf of the Attorney General, Advocate Ridley helpfully sought to summarise the grounds contained in the Notices and the narrative statement and, drawing on Advocate Ridley’s summary, we would summarise the grounds as follows: (i) The prosecution used evidence in relation to the discontinued charge and the Appellants were cross-examined on this evidence. The video taken by Mr Sousa was forwarded to Probation following conviction. (ii) The Appellants were never given full disclosure in relation to the discontinued charge or in relation to a phone call to the police made by Mr Sousa on the evening in question. (iii) Mr Lombard knew Mr Sousa and Mr Sousa may have spoken to Mr Lombard in the two hours between the making of the video at the flat and the incident on the steps. Mr Sousa may also have given the video to Mr Lombard. (iv) Comments by the First Appellant at the scene and recorded by police officers were taken pre-caution.

- (v) The location of Mr Lombard's house was not clear until the morning of the trial and his evidence was not reliable. (vi) The evidence of Ms Freitas and Mr Perestrelo was not reliable. (vii) In the Notice of Appeal, the Appellants asserted that they were "misrepresented". New evidence
19. Although no formal application was ever made, the Appellants sought to adduce new evidence at the hearing before us. This was as follows: (i) A letter from Dr Kukula, consultant dermatologist, dated 17 May 2023 to the First Appellant's general practitioner confirming that she has lichen simplex chronicus at the nape of her neck. (ii) Other medical evidence concerning the First Appellant. (iii) A letter dated 19 September 2024 from Dr Bailey of Indigo Medical describing the possible effects of certain medication which was prescribed for the Second Appellant. (iv) Footage from the police body worn camera showing events when the police arrived at the steps following Mr Lombard's telephone call and spoke to the Appellants and others.
20. The principles applicable when considering whether fresh evidence may be adduced on appeal are well-established; see the decision of the Court of Appeal in *Norris v AG* [2014] JCA 087 at [49], following *AG v Gorvel* (1973) JJ 2503 at 2505. The applicable principles are those stated by the English Court of Appeal in *R v Parks* 46 Cr. App. R. 29 at 32: "Those principles can be summarised in this way: first, the evidence that it is sought to call must be evidence which was not available at the trial. Secondly, and this goes without saying, it must be evidence relevant to the issues. Thirdly, it must be evidence which is credible evidence in the sense that it is well capable of belief; it is not for this court to decide whether it is to be believed or not, but evidence which is capable of belief. Fourthly, the court will, after considering that evidence, go on to consider whether there might have been a reasonable doubt in the minds of the jury as to the guilt of the appellant if that evidence had been given together with the other evidence at the trial."
21. There is good reason for the first principle, namely that the evidence must have been not available at trial. As memorably stated, albeit in a different context, by Lewison LJ in the English Court of Appeal in *Fage UK Ltd v Chobani UK Ltd* [2014] EWCA Civ 5 at [114], "the trial is not a dress rehearsal. It is the first and last night of the show". It is incumbent upon parties to put their best foot forward and adduce all the evidence upon which they wish to rely at the trial. It is not open to them simply to have a second bite of the cherry on appeal by bringing forward evidence which they wish in retrospect they had adduced at trial.
22. We have carefully examined all the proposed fresh evidence in order to decide whether, applying the above test in *Norris*, such evidence should be formally admitted. In relation to the first three categories: (i) We decline to admit the letter from Dr Kukula. It would clearly have been possible to have obtained this letter at trial and it was therefore available. Furthermore, it could not possibly have made any difference to the Magistrate's decision. This is because there was no challenge at trial to the evidence of the Appellants that the First Appellant had a rash on her neck; the issue in dispute was whether the Second Appellant was squeezing a spot when they were on the steps and whether this had somehow misled

the witnesses into thinking that sexual intercourse was taking place. (ii) We also decline to admit the other medical evidence concerning the First Appellant. This consists of (i) a letter dated 23 July 2020 from Mr Salih, consultant gynaecologist, to the First Appellant's general practitioner concerning a prescription and (ii) documents concerning a possible attendance for a fracture by the First Appellant in May 2024. The letter of July 2020 was clearly available at trial and we cannot see that it would have made any difference to the Magistrate's decision. The reference to the fracture clinic in May 2024 would clearly not have been available at trial but cannot possibly be in any way relevant to whether the Appellants were having sexual intercourse in September 2023. It seems its relevance may have been to explain any delay in appealing. (iii) As to the letter dated 19 September 2024 from Dr Bailey, this evidence would also have been available in the sense that Dr Bailey could have been asked to write it at the time of the trial. However, again, we also do not see that it could possibly have made any difference to the Magistrate's decision. The letter is in very general terms and could not, in our judgment, have affected the Magistrate's decision. We therefore decline to admit it.

23. As to the body worn camera footage, that was disclosed to the defence before trial and was accordingly available as evidence. Again, having viewed it, we do not consider that it could have made any difference to the Magistrate's decision and we shall explain this in more detail when considering particular aspects of the grounds of appeal. Accordingly, we also decline to admit the footage for these reasons. The test on appeal
24. It is important to recall the function of this Court when hearing an appeal against conviction from the Magistrate's Court. This is not a re-trial. It is the Magistrate who has seen and heard the witnesses and whose duty it is to determine whether the prosecution has proved the case to the criminal standard. The well-established role of this Court is as set out in *Rushton v AG* 1989/174 (Royal Court, 16th October 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 lightly 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." Decision
25. Ground (i) was not pressed at the hearing and in our judgment it was not made out. We were informed that the full prosecution case for both charges was served on the Appellants through their advocates on 17 November 2023. Once the charge in relation to the flat was discontinued on 9 February 2024, the evidence to be adduced was adjusted. In particular, references to events at the flat were excluded. We have read the transcript of the hearing before the Magistrate. The only reference to evidence relevant to the discontinued charge that we can identify is where the Appellants said that they had had sexual intercourse at the flat earlier that evening. However this was evidence adduced by the Appellants, not by the

prosecution. No doubt it was thought relevant as part of their case that they were unlikely to be having sexual intercourse again shortly afterwards at the steps. As to the fact that the video of the sexual intercourse at the flat taken secretly by Mr Sousa was shown to Probation after conviction, this cannot be relevant to an appeal against conviction. The video was not adduced in evidence before the Magistrate.

26. As to Ground (ii), the only specific complaint of non-disclosure identified before us was as to whether Mr Sousa had made a telephone call to the police earlier that evening before the call from Mr Lombard concerning events at the steps. We were informed by Advocate Ridley that the police had searched their system and there was no record of any call from Mr Sousa; the only call was from Mr Lombard.
27. However, we were shown a witness statement by a PC Morris dated 3 September 2023. PC Morris was one of those who attended the scene shortly after 8pm. He said that he was informed by the police control room of certain information provided by the witnesses and by the 'original caller'. Later in his statement he refers to being told that the original caller had said that they had come across the Appellants on a property nearby having consensual sex. This would suggest that the 'original caller' was Mr Sousa (who had secretly taken the video of the sexual intercourse at the flat), as there was no suggestion that Mr Lombard ever saw the Appellants having sex at the flat.
28. On the face of it, the statement from PC Morris appears to be inconsistent with the lack of any record of a phone call from Mr Sousa. However, we do not think that this apparent inconsistency casts any doubt on the conviction for the following reasons: (i) It is clear from PC Morris' statement that he is not giving direct evidence about the original caller. He is simply recording his understanding about the position obtained from other police officers. It is therefore hearsay and there is considerable scope for misunderstanding or mishearing. (ii) Even if there was a call from Mr Sousa, we cannot see that it is relevant to the charge. There is no suggestion that Mr Sousa was a witness to the events at the steps. If he was calling, it can only have been in connection with events at the flat, in respect of which the charge had been discontinued. Accordingly, we cannot see that the Magistrate's decision could possibly have been affected even if she had been told that Mr Sousa had made a call to the police that evening.
29. At the hearing, the Appellants elaborated upon Ground (iii). They asserted that Mr Lombard not only knew Mr Sousa but had spoken to Mr Sousa that evening before he gave his statement to the police. The inference seemed to be that this made Mr Lombard's evidence unreliable, perhaps because of Mr Sousa's alleged animus against the Appellants. The Appellants submitted that the body worn camera footage would show Mr Sousa and Mr Lombard together when the police were at the scene and before Mr Lombard gave his police statement.

30. Accordingly, at the Appellants' request, we watched the body worn camera footage. It did not show Mr Sousa speaking to Mr Lombard although it did show Mr Lombard speaking to a police officer on the left hand pavement before crossing the road towards his residence. In the circumstances, there is nothing to support the assertion that Mr Sousa and Mr Lombard had or may have spoken together before Mr Lombard gave his statement.
31. But even if that were the position, we do not see that this undermines Mr Lombard's evidence. As discussed in relation to Ground (ii), Mr Sousa could say nothing about what happened at the steps. Mr Lombard, on the other hand, described what he was seeing whilst on the telephone to the police and subsequently gave evidence broadly consistent with this in the Magistrate's Court. Furthermore, as the Magistrate put it, his evidence as to what the Appellants were doing was consistent with the evidence of Ms Freitas and Mr Perestrelo and there is no suggestion that they were known to Mr Lombard. In the circumstances, there is nothing in this ground which undermines the Magistrate's conclusion.
32. As to Ground (iv), namely that the First Appellant was questioned at the scene before she was cautioned, no evidence in relation to any such questions or her responses was adduced as part of the prosecution case, nor was the First Appellant cross-examined about them. It was the First Appellant herself who mentioned the subject very briefly, namely that she had been asked pre-caution whether she had had sex with the Second Appellant that day. In any event, the evidence cannot possibly have prejudiced the Appellants' case given that they themselves introduced in evidence at the trial that they had had sex at the flat earlier that evening.
33. Ground (v) relates to the location of the house where Mr Lombard was living together with certain points about the reliability of his evidence. In his police statement and in evidence in chief, Mr Lombard stated that he was approximately 10 metres away from the Appellants who were at the top of the steps. In cross-examination by Advocate Robinson he accepted that the distance was 20 to 25 metres and in answer to Advocate Mière, he accepted a figure of 25 metres. Both counsel referred to this in their closing speeches. Accordingly the matter was fully ventilated before the Magistrate when she came to consider her verdict and the fact that Mr Lombard changed his estimate of the distance from which he was viewing the incident cannot possibly mean that the Magistrate's conclusion was unreasonable.
34. The Appellants also submitted in their narrative statement of grounds that, in his phone call to the police, Mr Lombard was telling the police that the Second Appellant was resisting arrest. It is to be recalled that Mr Lombard stayed on the telephone for a short while after the police arrived. We have read the edited transcript of the telephone call which was before the Magistrate and can see no reference to Mr Lombard stating that the Second Appellant was resisting arrest. It follows that we reject Ground (v).
35. As to Ground (vi), this relates to the reliability of the evidence of Ms Freitas and Mr Perestrelo. It is submitted that their evidence should not have been relied upon because of the brevity of the time during which they saw the Appellants and because of inconsistencies

in relation to their description of the clothing worn by the Appellants. In this latter respect, it was agreed in the admissions before the Magistrate that the First Appellant was wearing a long black top with thin shoulder straps over a dress/skirt and that the Second Appellant was wearing a red Manchester United top and black shorts.

36. In her evidence, Ms Freitas initially said that she could not recall what the woman (i.e. the First Appellant) was wearing but stated that the woman was not wearing anything on her bottom half when the Second Appellant was standing behind her and moving his hips back and forth. On being allowed to refresh her memory from her witness statement, she recalled that the woman was wearing a black vest top.
37. Mr Perestrelo said in evidence that the woman was wearing a long top and maybe leggings or something like that. He said the man was wearing a red top and his trousers were down. He said that he could see a bit of the man's thighs and he could also see the woman's glutes. The man's trousers were down and the woman's leggings were down so that he could see her glutes. Later on he said that he could not remember whether the man was wearing trousers or shorts.
38. In his evidence, as recalled earlier, the Second Appellant said that he did not have his shorts down but the First Appellant's skirt might have ridden up and shown her glutes. Furthermore, the First Appellant was not wearing leggings as suggested by Mr Perestrelo.
39. In our judgment, these were matters which were before the Magistrate. It was for her to consider whether any misdescription of the Appellants' clothing by the two witnesses undermined or cast doubt on their essential evidence, which was that the Appellants were engaged in having sexual intercourse.
40. The Appellants also sought to rely upon a passage in the body worn camera footage as casting doubt upon the Magistrate's decision. The footage shows that, at one point after the police arrived at the scene, the police officer with the body worn camera spoke to a fellow police officer ("the second officer") who said that he had spoken to a couple across the road and that they said that they had only seen the man, not the woman. The Appellants pointed out that this is quite different from the evidence of Ms Freitas and Mr Perestrelo who, both in their police statements and in their oral evidence, said that they had seen both the man and the woman and that they were having sexual intercourse.
41. We do not think that this assists the Appellants for two reasons. First, it is by no means clear that the second officer is speaking of the same couple, i.e. Ms Freitas and Mr Perestrelo. They were not across the road; they were on the same side of the road as the steps and were continuing towards First Tower. Furthermore, the body worn camera footage appears to show a couple on the opposite side of the road turning into an entrance on the opposite side, which would suggest this may have been a different couple, as Ms Freitas and Mr Perestrelo were heading for First Tower. Accordingly, there is no satisfactory evidence that the second officer is speaking of Ms Freitas and Mr Perestrelo. Secondly, even if it was Ms Freitas and Mr Perestrelo to whom the second officer spoke, it was hearsay and he was simply reporting,

in a fairly fast moving situation, what he understood the couple to have said. There is great scope for mishearing or misunderstanding. The fact remains that witness statements were taken from the couple at 8.51 that evening (i.e. very shortly after the event) and there is no suggestion that those statements are inconsistent with their oral evidence in this respect.

42. Putting these matters together, we do not consider that the body worn camera footage, which could after all have been adduced in evidence and used to probe the evidence at the hearing, casts any doubt upon the evidence of the couple or upon the Magistrate's decision.
43. The final ground of appeal set out in the Notices of Appeal is that the Appellants were 'misrepresented'. We take this to mean that they were not happy with their representation by Advocate Robinson and Advocate Mière respectively. No specific allegation has been put to the advocates in order for them to have any opportunity to respond. We have carefully considered the transcript of the hearing before the Magistrate, including the cross-examination by the advocates of the prosecution witnesses, the examination in chief of the Appellants and the closing submissions by the two advocates on their behalf. We cannot identify any deficiency in the advocates' conduct of the defence which might have affected the Magistrate's decision.
44. In all the circumstances, having reviewed the evidence before the Magistrate and taken note of the points raised by the Appellants before us, we are in no doubt that there was ample evidence upon which the Magistrate could properly convict and none of the matters raised before us could reasonably have affected that decision. In the circumstances, we dismissed the Appellants' appeal. *Authorities Norris v AG* [2014] JCA 087. *AG v Gorvel* (1973) JJ 2503. *R v Parks* 46 Cr. App. R. 29. *Fage UK Ltd v Chobani UK Ltd* [2014] EWCA Civ 5 *Rushton v AG* 1989/174

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