

JERSEY / JUDGMENT

M v AG [2020] JCA 100 (08 June 2020)

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Court of Appeal 8 June 2020 Before : Mr Jonathan Crow, QC, President, Mr David Perry, QC and Sir William Bailhache Between M Appellant And AG Respondent Advocate D. S. Steenson for the Appellant. Crown Advocate E. L. Hollywood for the Respondent.

judgment

Perry JA:

Introduction

1. The Appellant, M, is aged 52. On 29 November 2019, following a trial in the Royal Court before Commissioner Clyde-Smith and a jury he was convicted of two counts of rape. A co-accused, P, who is also aged 52, was convicted of one offence of rape and one offence of indecent assault. The offences were committed on a single occasion late in 1988, when both men were aged 20. The Complainant is now aged 47. At the time of the material events she was aged 15. Her evidence of what had occurred over 31 years ago formed an essential part of the prosecution case. She gave her evidence in person before the Royal Court over the course of two days and was cross-examined by defence counsel. It is apparent from the jury's verdicts that her evidence was accepted as both truthful and reliable. 2. M now appeals against his conviction. He advances a number of grounds of appeal, which reduced to their essentials really amount to a claim that the Complainant's evidence was unconvincing and should not have been accepted by the jury. He also argues that certain features of the Royal Court proceedings rendered his trial unfair. Overall, he submits that the convictions should be set aside and his appeal allowed under Article 26 of the Court of Appeal (Jersey) Law 1961 . In considering the merits of the arguments we have had the benefit of written and oral submissions from Advocate David Steenson, who did not appear on the Appellant's behalf at the trial, and from Crown Advocate Emma Hollywood, who appeared on behalf of the prosecution at the trial. We have also been assisted by an affidavit sworn by the Appellant's trial counsel, Advocate Luke Sette, dated 17 April 2020, which was filed in response to a number of criticisms advanced by Advocate Steenson in relation to Advocate Sette's conduct of the Appellant's case at trial. We are grateful to all counsel for their assistance. 3. To put the competing arguments in context it is necessary to provide a summary of the prosecution case. The Prosecution Case 4. The prosecution case was that the Complainant had been raped and indecently assaulted whilst on a weekend youth club

trip to a venue in St Brelade, sometime between 29 September 1988 and 31 December 1988. The Appellant and P were present at the venue having offered to help oversee the trip in an informal supervisory capacity. The offences were committed late on a Friday evening, after the group of youths had arrived at the venue. Earlier in the evening, a group including the Complainant, the Appellant and P watched a video in a classroom at the venue. There was some drinking and the Complainant was given a bottle containing some clear liquid which she drank, not knowing what it was. 5. The Complainant's account of the events thereafter is that she recalled the video still being on and sitting down. The next thing she recalled was being in the same room, but it was by now dark and the lights were off. She was at the back of the room, lying on the floor with both the Appellant and P present. She recalled the other members of the group going to their dormitories. She was then raped; first by the Appellant, while she lay on the floor of the classroom, and then by P also while she lay on the floor of the classroom. This formed the basis of count 1 of the indictment. She said no to each of them and tried to clamp her legs together, but this was to no effect. She was then raped for a second time by the Appellant. This formed the basis of count 2 of the indictment. While this was taking place, P forced his penis into her mouth. This formed the basis of count 3 of the indictment. 6. During the entirety of the incident, the Complainant felt unable to move or cry out for help. At some point she blacked out and woke up early the next morning, still in the classroom and still on the floor. She made her way to the toilets where she was seen by her best friend who had woken up early to look for her. Her friend, who gave evidence at the trial, noticed that she was distressed and her clothing dishevelled. The Complainant made a complaint that she had been sexually assaulted by "[First Name redacted]" which her friend understood to be a reference to P. 7. Later that morning, The Complainant spent time with her boyfriend 'AP', also aged 15. He noticed how distressed she was throughout the course of that day. She could not bring herself to tell him that sexual intercourse had taken place but the following day she said to him something like 'they did something to me on Friday night', referring to the Appellant and P. He understood her to mean rape. AP, who had married the Complainant in 1992, also gave evidence at the trial. 8. Approximately three weeks after she was raped the Complainant telephoned Childline and disclosed what had happened. There was also evidence that her behaviour underwent a significant change following the trip to the venue, with instances of self-harming, loss of weight and anxiety attacks. She and her husband had some contact with the Appellant and his family in the years following 1988, although it appears that the contact diminished considerably sometime around 2000. The Formal Complaint 9. The Complainant's first formal complaint of sexual abuse was made to the States of Jersey Police almost 14 years after the events in March 2002. In July 2002, she asked for the investigation to be paused until she felt emotionally strong enough to proceed. In November 2002, the case was reviewed by Detective Inspector Bonney who decided that there would be no further action, at least at that time, having regard to the Complainant's wishes. The result was that neither the Appellant nor P was interviewed in relation to the complaint. The Complainant next contacted the States of Jersey Police by email in March 2008. Attempts by the States of Jersey Police to respond to this email met with no reply. Over 7 years later, in June 2015, she again contacted the States of Jersey Police and provided

information in relation to the alleged offences. In July 2015, the case was reopened. At that time, the original 2002 statement could not be found, and she provided a new statement which she signed on 16 October 2015. Subsequently, the 2002 statement was located in a police archive and it formed part of the prosecution materials served on the Appellant and his co-accused. Although there were inconsistencies between the 2002 and the 2015 statements, they were consistent in their description of the sequence and substance of the rapes and the indecent assault. 10. In the course of giving her evidence at the trial, the Complainant explained the delay in pursuing the complaint and, while the reasons were detailed, the essential point was her concern for her own wellbeing and the wellbeing of her family. The position had been complicated by the fact that she had links to the Appellant's family which made her position, as she saw it, extremely difficult. She explained the triggering events which caused her to make formal complaints in 2002 and 2015. In the case of the 2002 complaint, the triggering event was a proposed school trip to the venue in St Brelade involving her own daughter. In the case of the 2015 complaint, the triggering event was the prospect of certain family gatherings which might have led her children to come into contact with the Appellant and his family. The Complainant was cross-examined extensively on these matters. She explained in clear terms the effect of the offences and how difficult it had been to deal with their impact. It is also relevant to note that the Complainant is by occupation a counsellor in an educational institution. She had undergone training for her role as a counsellor and was able to rely on her training and experience when explaining the effects of trauma and stress. When giving evidence she claimed that her training helped to develop strategies to deal with the emotional difficulties she had experienced following the rapes. Arrests and Interviews 11. Both the Appellant and P were arrested and interviewed under caution on 11 February 2016. This was almost 28 years after the trip to the venue. They denied the allegations. The Appellant said that the account that he had had sex with the Complainant in the classroom at the venue in St Brelade was "a complete fabrication". He did however admit to being in the classroom, but in response to hearing the Complainant's account of what had happened he stated: "She's a good story writer. I'll give her that". Towards the end of the interview, the Appellant said that he had no recollection of having sex with the Complainant and that he had memory blocks about the night in question. For his part, P admitted being in the classroom, together with the Appellant and the Complainant, and being very drunk. He said that there had been sexual intercourse but that the sex had been consensual. At the conclusion of the interviews both men were released on police bail. Almost a year later, in January 2017, the Appellant was released from police bail having been advised that the investigation was ongoing. 12. It was at around this time (early 2017) that two case files were considered by the Law Officers' Department. One file concerned a number of rape offences committed by P against a young female at a time when she was aged between 10 and 14 and he was aged between 15 and 20. The other file concerned the present offences committed by the Appellant and P. A decision was taken to proceed with the offences committed by P first and the prosecution in relation to the Appellant and P was put on hold until the conclusion of the first prosecution. P was indicted on 25 August 2017, convicted after a six-day Assize trial (22 February to 1 March 2018) and

sentenced on 27 April 2018. The Royal Court Proceedings 13. On 15 March 2019, the Appellant and his co-accused were charged (both with offences of rape and, additionally in the case of P, indecent assault) and directly indicted to the Royal Court. 14. On 12 April 2019, they appeared before the Royal Court and entered pleas of not guilty to the allegations. 15. The Appellant served an amended defence case statement, dated 15 November 2019, in which, under the heading 'Nature of the defence', it was stated: "1. The defendant accepts that he was at the venue in St Brelade at the relevant time.

2. The defendant does not remember anything of significance in respect of the relevant time. He denies having sex with the complainant. The Crown is therefore put to proof.
3. The defence submit that the complaints are untrue and that the complainant has been inconsistent in her accounts." 16. It also dealt with contact between the Complainant and the Appellant after the alleged rape, saying amongst other things that they had been present on numerous social occasions and there had been no overt evidence of any difficulties between them. 17. On 20 November 2019, in a reserved ruling, the Commissioner allowed a prosecution application to admit evidence of P's previous rape convictions under Article 82F(1)(a) of the Police Procedures and Criminal Guidance (Jersey) Law 2003 (the "PPCE"). While the application was opposed by both defendants, once admitted the evidence formed part of the Agreed Facts at the trial, which so far as material was in the following terms: "P has eight convictions for offences of rape committed against a female, who was aged 10 to 14, when he was aged 15 to 20. The first rape on the female, then aged 10, was committed between 1983 and 1984 when P was aged 15, this is the first conviction. The second to the seventh rapes were committed between 1984 and 1988 when the female was aged 10 to 14 and P was aged 15 to 20. The eighth conviction for rape on the same female was committed between 1988 and 1989 when the female in that case was aged 14 and P was aged between 19 and 20." 18. The trial began on 25 November 2019. One juror was discharged for good reason during the course of the first day's proceedings. The three principal witnesses for the prosecution were the Complainant, her best friend (who had witnessed her distress) and AP, her boyfriend at the time and now her husband. Neither the Appellant nor P gave evidence in support of their defence, although the Appellant called two witnesses in support of his case, B, his former wife, and C, one of his brothers. On 29 November 2019, the jury returned majority guilty verdicts (9 to 2) on all three counts of the trial billet. The Appellant's Arguments on Appeal 19. In advance of the appeal hearing we were provided with over six lever arch files of materials, including a full transcript of the trial proceedings, and detailed written contentions submitted by both parties. The Appellant's arguments, reduced to their essentials, are as follows: (i) The Complainant's evidence, when considered "in the round" , was unconvincing and its unsatisfactory nature is evidenced by the fact that two members of the jury were not satisfied of the Appellant's guilt. (ii) The prosecution's opening speech to the jury was unnecessarily emotive and likely to excite sympathy for the Complainant with a corresponding prejudicial impact on the Appellant. (iii) The previous convictions of P should not have been admitted in evidence or, alternatively, the Appellant should have been tried separately. Having been admitted in evidence, P's previous convictions caused

significant prejudice to the Appellant and this prejudice was incapable of being remedied by judicial direction. (iv) Trial Counsel was at fault in: (a) failing to make an application to stay the proceedings as an abuse of process on the grounds of delay; (b) failing to make an application for the Appellant to be tried separately from P; and (c) advising the Appellant not to give evidence. (v) The failures of Trial Counsel were so fundamental as to deprive the Appellant of a fair trial. (vi) The judicial directions, made necessary by a joint trial in which P's previous convictions were before the jury, were unwieldy and too complex for the jury properly to digest and the guilty verdicts were the product of confusion. (vii) There were additional failings on the part of trial counsel and the prosecution in relation to the disclosure of unused material. 20. In terms of Article 26(1) of the Court of Appeal (Jersey) Law 1961, the Appellant contends that the verdicts of guilty should be set aside on the ground that they are unreasonable or cannot be supported having regard to the evidence. He also submits that his trial was vitiated by legal error resulting in a miscarriage of justice. 21. On behalf of the Respondent, Crown Advocate Hollywood resists the appeal and submits that the trial was in all respects fair and that the verdicts are no more than a reflection of the compelling nature of the prosecution evidence. 22. For the purposes of our consideration of the various issues, it is convenient first to address the Appellant's submissions concerning the evidence given by the Complainant. The Complainant's Evidence 23. In his written contentions in support of the appeal, Advocate Steenson submitted that the Complainant's evidence "was confused, illogical, fantastical; inconsistent (internally and externally); comprised of ex post facto rationalisations; and/or simply made up." 24. In support of these arguments, the Appellant relies on the differences between the contents of the Complainant's 2002 witness statement, the contents of her 2015 witness statement, and what she said when giving evidence in person. He points in particular to the following matters: (i) The Complainant's evidence that the 2015 witness statement was likely to be a more detailed and accurate version of events compiled as a result of deploying learning strategies to deal with post-traumatic stress disorder, even though it was written 27 years after the events giving rise to the charges. (ii) The alleged implausibility of the Complainant's account of how she had come to find herself in a room with only the defendants for company; how she had accepted a drink; how she had chosen not to leave and how she found herself lying on the floor of the classroom feeling helpless and paralysed. (iii) The "unusual evidence" given by the Complainant, such as the fact that she said she felt connected to her best friend telepathically and that during the assault she had concentrated on a plug socket at floor level on the right-hand side of the classroom, and imagined that she was getting into it and thus escaping the assault; a detail not mentioned in her witness statements. (iv) The inconsistencies in the Complainant's accounts which were identified in Trial Counsel's closing speech (such as inconsistencies to do with her clothing, where she went after she left the classroom and what she had said to her friends). (v) While the Complainant spoke of a desire to avoid contact with the Appellant and his family after the assault, she accepted that she had met the Appellant at a number of social gatherings in the years following 1988. 25. Advocate Steenson also submitted that the Complainant's evidence was characterised by "an unusually determined attempt" to justify the inconsistencies between the various accounts

in her statements and oral testimony. For example, it was argued that the Complainant's reference to the therapy and training she received to deal with post-traumatic stress disorder was merely an attempt to conceal the deficiencies in her evidence and thus enhance her credibility. On this aspect of the case, the Appellant also relied on the fact that no evidence was adduced about any form of therapy or training received by the Complainant and submitted that medical records should have been obtained and reviewed by both prosecution and defence. The position in relation to the medical records, which were in fact obtained and reviewed by the prosecution, is a point we consider in more detail below. 26. The Appellant's additional submission is that there was little by way of corroboration of the Complainant's evidence and the evidence of her distress was equally consistent with an assault by P, which is what the Complainant initially told her best friend. Thus, despite the jury's verdict, the Complainant was an unreliable witness and her evidence should not have been accepted by the jury. 27. In responding to the appeal, Crown Advocate Hollywood submitted that any question of the Complainant's credibility and reliability was for the jury and is not now a matter for assessment by the Court of Appeal. This would be to usurp the constitutional role of the jury as the fact-finding tribunal in serious criminal cases. In addition to this point of principle, it was also submitted that the Complainant's evidence was compelling. The arguments advanced on behalf of the Crown may be summarised as follows: (i) The Complainant's evidence was not confused, illogical, inconsistent, or fantastical. This is apparent from a fair reading of her statements and oral testimony. Having seen and heard the Complainant give evidence over a period of two days, it was open to the jury to accept her evidence and the jury properly did so. (ii) The Complainant had provided a consistent and detailed account of how the sexual assaults had come to be committed and the sequence in which they occurred. (iii) The Complainant was a reliable historian. Thus, her evidence concerning the date range of the offending was supported by other sources of evidence (such as her mother who had located the trip to the venue in the latter part of 1988 and photographs taken in 1988 which showed clothing and articles to which she had made reference in the course of her evidence). In any event, her evidence in relation to the date was thoroughly tested and unshaken during cross-examination by counsel acting on behalf of both the Appellant and P. (iv) The Complainant was cross-examined about her contact with the Appellant at social gatherings in the years following 1988 and why it was that the contact had finally ceased. This evidence was also supported, at least in certain respects, by another prosecution witness, AP, and by the Appellant's former wife, B, who was called as a defence witness at the trial. (v) The Complainant was clear in her recall of events and there were few inconsistencies on the issue of the sexual assaults. She explained that her 2002 statement, written at a time when she was suffering from post-traumatic stress disorder, was identical to the 2015 statement in relation to "the bones of what happened". Thus, while the 2015 statement provided additional details, it wasn't different, "it was as well as". (vi) The words used by the Complainant in evidence to describe her physical and mental state at the time of the assaults (catatonic, paralysed, dissociation) and her description of wishing to escape or connect with her best friend 'telepathically', were words used to describe her feelings at a time when she was being raped and indecently

assaulted by two men, both of whom were known to her. 28. In contradistinction to the arguments advanced on behalf of the Appellant, Crown Advocate Hollywood submitted that the Complainant was a convincing and credible witness who gave powerful and consistent testimony of the sexual assaults committed by the Appellant and P. There was support for her evidence in the form of her distress and recent complaint. There was additional support for various aspects of her evidence not only from the prosecution witnesses but also the Appellant's former wife whose evidence it was that there had been no significant contact with the Complainant's family and her family since around 2000. This, on one interpretation, was supportive of an unwillingness on the part of the Complainant to have any form of social contact with the Appellant, which was in turn capable of supporting her claim of rape. 29. In our view, the starting point in the analysis of the Complainant's evidence is that her testimony contained clear allegations of both rape and indecent assault. There was ample evidence for consideration by the jury; the fact that neither defendant made any submission of no case to answer at the close of the prosecution case represents a realistic acknowledgement on their part that the jury, properly directed, could properly convict the Appellant and P on each of the counts in the indictment. The issues raised by Advocate Steenson were explored in great detail during the Complainant's evidence and reiterated during closing speeches. The jury received careful and well-balanced directions from the Commissioner on all the relevant issues including the burden and standard of proof and how to approach the Complainant's evidence. These directions, which were reduced into writing for the jury's benefit, had been discussed with all counsel who agreed with their contents. The Commissioner dealt with the criticisms made of the Complainant and the approach the jury should adopt in relation to her evidence in the following way: "One criticism of the complainant made by the defendants, which you will need to consider with care, is that they say she has, to some extent, given inconsistent accounts of the events that night and counsel have addressed you on that in some detail. I need however to give you some assistance with your approach to the complainant's evidence. The experience of the courts is that it is unwise to approach the issue of inconsistency with an assumption that a true account is always consistent, or that an inconsistent account is always untrue. Every person who is a victim of a serious sexual assault suffers trauma to a greater or lesser degree. The quality of our memory is affected by the ability of the mind to take in the details of the experience, register them and to recall them afterwards. Trauma can interfere with these processes, as indeed can intoxication. Experience tells us that the way in which trauma affects memory varies considerably. It may affect a person's ability accurately to lay down in the memory, in the correct sequence, each of the constituent parts of the ordeal. If the trauma did have such an effect, the ability of the witness to recall events consistently is also likely to be affected. You might think that intoxication would have the same effect. I am sure you will appreciate that someone who is involved in a shocking incident, particularly if intoxicated, may be affected in this way. After the event, some people ruminate constantly on what happened, and by that process reconstruct, accurately or perhaps inaccurately, the events which occurred; others hate to confront their memories and do their best to avoid thinking about them. The result is that recall is not always consistent. If you accept that

trauma and intoxication can affect people, and if the complainant did indeed suffer trauma and was intoxicated, you might consider her failure of recall to be understandable. On the other hand, a person who has made a false complaint may also have difficulty being consistent. The inconsistencies may expose the possibility that the details do not represent a true recall of events but are part of a manufactured account which is difficult to remember consistently. Inconsistent accounts may, therefore, be an indicator that the account as a whole is untrue. How then should you approach the evidence of the Complainant? Each of these inconsistencies needs to be examined with a view to making a decision, firstly, whether you accept that it is an inconsistency, and, secondly, whether it has significance in relation to the truthfulness of the Complainant's account as a whole. If, having given due consideration to the defence arguments, you are sure that the essential parts of the complainant's account are true, you will no doubt act on that conclusion. But if you are left in doubt about the truthfulness or reliability of the complainant's account as a whole in relation to each defendant because the inconsistencies cannot be sufficiently explained, you must acquit that defendant." 30. In our view, this careful and accurate direction properly left to the jury the determination of whether or not the Complainant was a truthful and reliable witness. Unlike this Court, the jury had the benefit of seeing the Complainant give evidence in person. They were in the best possible position to decide whether or not to accept her evidence, and that was the key decision in the case. As the Commissioner expressed the point in the course of his summing-up, the Complainant's credibility and reliability were "at the heart of the trial". The Appellant's arguments to the effect that "in the round, the Complainant's evidence was unconvincing" are merely an attempt to recycle submissions that were made to and rejected by the jury. In terms of principle, it is not for this Court to substitute its views for those of the jury: AG v Edmond-O'Brien

[2006] JLR 133 . That principle apart, we should also make clear that we have read (and re-read) the Complainant's evidence in its entirety. Based upon our review, we have no reason whatsoever to call into question the soundness of the jury's verdict. 31. The position in relation to the Complainant's evidence is straightforward. Her evidence was a matter for the jury to consider. There was no misdirection in relation to how the jury were to approach her evidence, and the verdicts were ones which it was reasonably open to the jury to reach. It follows that we reject the Appellant's arguments in relation to the quality of the Complainant's evidence. 32. Finally, as a footnote on this aspect of this appeal, we would make two points. First, the Appellant refers to the fact that his conviction was not unanimous but by a majority. This is a bad point. The majority verdict in no way bears upon the safety of the conviction for the simple reason the law allows for conviction by a majority (see Article 75(2) of the Criminal Procedure (Jersey) Law 2018) and we would not expect to see similar arguments advanced in future appeals. Second, it appears to us that many of the criticisms made of the Complainant's evidence reflect untested assumptions of how a 15-year-old girl (or any other victim) would or might react to an incident of sexual abuse. We would wish to emphasise that, just as in other contexts, behavioural stereotyping has no place in a criminal trial, whether a trial of sexual abuse of otherwise;

every allegation of whatever nature should be judged without preconception and on its own individual merits. The Prosecution's Opening Speech 33. In his written contentions, Advocate Steenson submitted that prosecuting counsel used unnecessarily emotive language in her opening address to the jury, and that this was done to elicit sympathy for the Complainant and corresponding revulsion for the defendants in what was recognised by the prosecution to be a weak case. We can deal with this complaint quite shortly. We have read the transcripts of the trial proceedings. In our view the prosecution case was presented with skill and conspicuous fairness. The prosecution's opening address was factually correct. It described in concise terms the details of the offences, namely three sexual assaults committed on a 15-year-old by two older males, including a simultaneous vaginal rape and serious indecent assault. There was no complaint from defence counsel at the time. Nor did the Commissioner intervene, as no doubt he would have done had he perceived any unfairness. In our view this complaint lacks merit and we are surprised that it was ever raised as a basis for challenging the conviction. P's Previous Convictions 34. As noted above, the Commissioner allowed the prosecution to adduce evidence of P's previous convictions for rape pursuant to Article 82E of the PPCE. Advocate Sette, who was then representing the Appellant, had objected to the admission of these convictions, on the basis that this would cause prejudice to the Appellant who was to be treated as a person of previous good character with no relevant previous convictions. This objection was properly brought under Article 76 of the PPCE, namely that the evidence would so adversely affect the fairness of the proceedings that the Court ought not to admit it. An application to exclude the evidence under Article 82E(2) was also made by P, the defendant whose bad character evidence the prosecution sought to admit. In the course of his ruling the Commissioner rejected the objections advanced by P and addressed the position of the Appellant: "It seems to me that the issue of prejudice as between co-accused in these circumstances could in fact be argued both ways in that M with his own good character direction and with P having his bad character direction before the jury is able to distinguish himself more fully from P... That evidence [viz, the evidence of P's previous convictions] is relevant only to P and that will be made clear to the jury." 35. Having given his ruling, the Commissioner raised the question of whether there would be an application for separate trials. There then followed this exchange with the Appellant's counsel: "Commissioner: Now Mr Sette if an application is going to be made to sever, and it does look as if case law is against you. Advocate Sette: Yes sir. Commissioner: I say that without prejudging it. Advocate Sette No sir, having considered the position I'll not be making that application. 36. In the absence of any application for the Appellant to be tried separately from P the trial proceeded against both accused. Later, in the course of his summing-up to the jury, the Commissioner gave the conventional direction that the case against each defendant was to be considered separately: "You must consider the case against each defendant... separately and you will return a separate verdict in respect of each defendant. Your verdicts may or may not be the same in each case. You may only convict either defendant if you are sure that he raped the Complainant." 37. The Commissioner also gave the jury directions in relation to the Appellant's good character

and then gave directions in relation to P's convictions which concluded with the following: "Whatever your assessment of P's previous convictions they are not evidence against M and must not be considered when you are assessing M's guilt or innocence. M is a man of good character and in no way should any convictions that P has reflect upon M." 38. It is against that background that we address the Appellant's complaint that P's previous convictions should have been excluded under Article 76 of the PPCE and that the resulting unfairness was incapable of being remedied by judicial direction. As an aspect of this complaint, Advocate Steenson also argued that the nature of the prosecution case was confused in that both the Appellant and P were jointly charged in a single count of rape even though the case was not advanced on the basis of any joint enterprise. It was submitted that this served to emphasise that the defendants' cases stood or fell together and highlighted the danger of admitting P's previous convictions. 39. We have no doubt that the Commissioner correctly exercised his discretion to admit the evidence of P's previous conviction for the reasons he gave. The evidence clearly established a propensity on the part of P to commit offences of the kind charged (rape) and was admissible under Article 82F of the PPCE, and not subject to exclusion under Article 82E(2). (We note, merely in passing, that P has not sought to appeal against his conviction.) Nor was it subject to exclusion under Article 76 of the PPCE at the behest of the Appellant: the evidence was relevant only to P. Once admitted, safeguards were in place to ensure that the admission of the evidence did not cause prejudice to either defendant: (i) The evidence of P's bad character was adduced by way of an agreed fact which ensured that it was not given undue prominence by the jury. (ii) Each of the parties' closing speeches made only limited reference to P's previous convictions and words of caution were expressed by all counsel as to their limited relevance to P's case. (iii) The Commissioner's directions to the jury made clear that the previous convictions related solely to the case against P and had no relevance to the Appellant's case. (iv) The Commissioner also directed the jury in relation to the Appellant's good character. 40. As a matter of principle, if a judge has directed himself or herself correctly and admitted evidence of bad character this Court will be very slow to intervene. It will only do so if the decision is plainly wrong or the discretion to admit the evidence has been exercised unreasonably in the *Wednesbury* sense. This corresponds with the position in England and Wales, see *R v Hanson*

[2005] 1 WLR 3169 (paragraph 15). In this case, the Commissioner's decision was plainly correct and had no prejudicial impact on the Appellant's case. We have no hesitation in rejecting Advocate Steenson's submission that the Commissioner wrongly gave undue prominence to the gateway under Article 82F of the PPCE and failed to have proper regard to Article 76. As the Commissioner noted, the evidence was relevant only to P and this was to be made clear to the jury, as indeed it was. 41. We also wish to make clear that we are unable to accept Advocate Steenson's submission that the jury may not have followed what he describes as the Commissioner's "relatively complex legal directions". The entire system of jury trial is based upon the assumption that the jury will follow the instructions which

they receive from the trial judge and that they will return a true verdict in accordance with the evidence. If authority is needed for this proposition, which we doubt, it can be found in the observations made by Lord Hope in *Montgomery v Her Majesty's Advocate*

[2001] 2 WLR 779 . 42. Nor do we accept the Appellant's submission in relation to the significance of proceeding on a single joint count of rape. The prosecution case was presented throughout on the basis that the Appellant and P were each individually guilty of rape. In other words, each had committed the offence as a principal independently from the other. This was reflected in the Commissioner's direction to the jury: "Count 1 is against both defendants and it is the prosecution case that both defendants raped the complainant, M immediately followed by P. You must consider the case against each defendant under this Count separately and you will return a separate verdict in respect of each defendant. Your verdicts may or may not be the same in each case. You may only convict each defendant if you are sure that he raped the complainant. 43. It was not necessary nor would it have been appropriate to advance the prosecution case on the basis of a joint enterprise. A joint charge of an offence against two or more persons allegedly committed together on the same occasion does not require a direction that the accused must have a common purpose or design, or that one is to be regarded as a principal and the other as aiding and abetting. In this case the Commissioner's direction was correct and not at all complicated. In our view there is no substance in the Appellant's argument. Nor is there any substance in his argument that it would have been "logical and better to separate out the defendants" . This point was not advanced at trial and the wording of the indictment caused no unfairness to either defendant. Severance 44. This leads to the issue of severance. The Appellant argues that the real significance of the decision to admit P's previous convictions, and the failure of the prosecution to proceed by way of separate charges, lies in the impact that these factors had on the fairness of the proceedings and that this unfairness could have been cured by severance of the indictment and the ordering of separate trials. In light of our earlier conclusions we can deal with this issue quite shortly. In our view, the Appellant's arguments in relation to severance are contrary to established practice and unrealistic. This no doubt explains why counsel at trial made no application for severance: such an application was bound to fail. The principles are well known: (i) It is only in exceptional cases that separate trials should be ordered for two or more defendants who are jointly charged with participation in one offence: *R v Moghal*

(1977) 65 Cr App R 56. (ii) There are powerful public interest reasons why joint offences should be tried jointly; the importance is not merely the saving of time and money; it also affects the desirability that the same verdict and the same treatment shall be returned against all those concerned in the same offence. (iii) The fact that the admission of evidence of bad character against one defendant would make the cases of other defendants much more difficult is not in itself a sufficient reason for excluding that evidence or for ordering severance: *R v X*

[2012] EWCA Crim 2276. 45. In the Appellant's case, the position at the trial is explained in the evidence given by Advocate Sette who had formed an initial view that an application for severance was unlikely to be successful. He advised the Appellant that the co-accused's bad character evidence was likely to be admitted in evidence and that any prejudice could be remedied by an appropriate judicial direction. In other words, a fair trial was nevertheless possible. Having considered the appropriate legal authorities, he decided not to make any application for severance. In his affidavit he explains the position as follows: "I considered the appropriate legal authorities in making the decision not to make an application for severance. This was a question of law which did not require me having an in-depth conversation in respect of the law with the Defendant. I do recall explaining to the Defendant that the usual process, essentially for convenience, was for jointly charged defendants to be tried together at the same trial. In particular I recall mentioning one public policy reason was to avoid a complainant having to give their evidence twice. I did explain that I formed the view that there was nothing exceptional about the Defendant's case which would justify me making an application for severance before advising the Court that I would not be pursuing an application for severance. Regrettably there is not an attendance note covering this discussion. I was therefore surprised to learn, as set out at paragraph 100 of the Appellant's contentions, that the defendant was surprised to learn that no application for severance was to be made and that he wished to pursue such an application. The Defendant never gave me such an impression or ever instructed me along these lines." 46. While it is regrettable that there is no attendance note of the discussions, the transcript of the proceedings provides clear support for Advocate Sette's account of events. On 20 November 2019, that is five days before the start of the trial, the Commissioner handed down his ruling in relation to the admissibility of P's previous convictions. Immediately after the ruling, the Commissioner questioned whether there was to be an application for severance. Advocate Sette replied: "No Sir, having considered the position, I'll not be making that application." 47. In our view Advocate Sette was entitled, in the exercise of his professional judgment, to decide that there was no justifiable basis on which to make an application for severance. In his affidavit he states: "I remain strongly of the view that any application for severance was destined to fail and that my efforts were better focused on preparing for trial." 48. We agree with Advocate Sette's assessment. As the English Court of Appeal noted in *R v X*, *supra*, a criminal trial must be fair to both the prosecution and the defence. Among the factors to be considered are the inter-relationship between the facts giving rise to the allegations; the impact of ordering two or more trials on the defendants and on the victim or victims; and whether directions the judge can give to the jury will suffice to secure a fair trial. As we have noted, jury trials are conducted on the basis that the judge's directions of law are to be applied faithfully. In our view, the Commissioner's decision to admit P's previous convictions was correct, and the ensuing proceedings were conducted with a scrupulous regard to fairness. The jury were directed to consider the case of each defendant separately and the Commissioner directed the jury that P's previous convictions were not evidence in the Appellant's case. There is no substance in the Appellant's complaint in relation to severance. Abuse of

Process 49. We turn now to the issue of delay. In his written contentions Advocate Steenson submits that an abuse of process argument could and should have been advanced at the trial on the basis that it was and is arguable that the passage of time since the commission of the offences rendered a fair trial impossible. 50. Before looking at how the issue of delay was in fact dealt with at the trial, it is necessary first to reiterate certain well-known principles. The categories of case in which the court has power to stay proceedings are twofold: first, where the court concludes that the accused can no longer receive a fair hearing; and, second, where it would otherwise be unfair to try the accused, that is where a stay is necessary to protect the integrity of the criminal justice system. The former focuses on the trial process while the latter applies where it offends the court's sense of justice and propriety to be asked to try the accused in the particular circumstances of the case: see generally, *Warren v AG for Jersey* [2012], 1 AC 22; *Warren v AG*

- [2011] JLR 424 . The authorities also make clear that there is a strong public interest in the prosecution of serious crime and that ordering a stay of proceedings is a remedy of last resort. The Appellant's argument is that his case falls into the first category and that he could not have a fair trial because of the passage of time since the events giving rise to the trial. 51. The effect of delay on the fairness of the trials has been considered in a number of cases both in England and Wales, and in Jersey. The leading English case remains *Attorney General's Reference (No 1 of 1990)*
- [1992] QB 630, in which Lord Lane CJ stated: "no stay should be imposed unless the defendant shows on the balance of probabilities that owing to the delay he will suffer serious prejudice to the extent that no fair trial can be held... In assessing whether there is likely to be prejudice and if so whether it can properly be described as serious, the following matters should be borne in mind: first, the power of the judge... to regulate the admissibility of evidence; secondly, the trial process itself, which should ensure that all relevant factual issues arising from delay will be placed before the jury as part of the evidence for their consideration, together with the powers of the judge to give appropriate directions to the jury before they consider their verdict." 52. This approach was endorsed more recently in *R v F(S)*
- [2012] QB 703 , in which a five-judge court presided over by Lord Judge CJ emphasised that in cases of delay the best safeguard against unfairness to either side is to be found in the trial process, which includes an evaluation by the jury of the evidence having taken the delay into account. 53. The decided cases also emphasise the importance of distinguishing between speculative assertions of prejudice based on the passage of time and specific evidence which can be shown to be unavailable as a result of delay. In *RD*
- [2013] EWCA Crim 1592 , the English Court of Appeal stated (per Treacy LJ at paragraph 15): "In considering the question of prejudice... it seems to us that it is necessary to distinguish between mere speculation about what missing documents or witnesses might show, and missing evidence which represents a significant and demonstrable chance of amounting

to decisive or strongly supportive evidence emerging on a specific issue in the case. The court will need to consider what evidence directly relevant to the appellant's case has been lost by reason of the passage of time. The court will then need to go on to consider the importance of the missing evidence in the context of the case as a whole and the issues before the jury." 54. In the earlier case of *R (Ebrahim) v Feltham Magistrates' Court*

[2001] 1 WLR 1293, Brooke LJ noted that it would only be in rare and exceptional cases that a fair trial would not be possible. This is because the trial process itself is equipped to deal with the bulk of complaints on which applications for a stay are founded. He went on to observe that 'missing evidence' is equally capable of creating a reasonable doubt in the minds of the jury as to the guilt of the accused: "It must be remembered that it is a commonplace in criminal trials for a defendant to rely on "holes" in the prosecution case, for example, a failure to take fingerprints or a failure to submit evidential material to forensic examination. If, in such a case, there is sufficient credible evidence, apart from the missing evidence, which, if believed, would justify a safe conviction, then a trial should proceed, leaving the defendant to seek to persuade the jury or justices not to convict because evidence which might otherwise have been available was not before the court through no fault of his. Often the absence of a video film or fingerprints or DNA material is likely to hamper the prosecution as much as the defence." 55. The leading authority in Jersey is *W v AG*

(2015) 1 JLR 29, which contains a helpful summary of the principles which mirror those in English case law: a stay should not be granted in the absence of serious prejudice to the defence such that a fair trial is no longer possible; when assessing whether there is serious prejudice the judge should bear in mind his power to regulate the admissibility of evidence and that the trial process itself should ensure that all relevant factual issues arising from the delay are placed before the jury for its determination; if having considered all these factors the judge decides that a fair trial is possible, a stay should not be granted. The burden of proof is on the defendant to show, on the balance or probabilities, that a stay should be imposed. 56. Advocate Steenson accepts that the bar for demonstrating an abuse of process is a high one. 57. In our view, the observations of Brooke LJ in *Ebrahim*, supra, have particular relevance to the Appellant's case. In his affidavit, Advocate Sette says that at no point did he, or the colleagues with whom he discussed the case, consider that the delay was such as to prevent a fair trial. In his view, it appeared "the prejudice worked both ways". It is helpful to set out his reasoning: "When looking at the evidence at an early stage of the proceedings, my view was that the delay between the making of the complaints and the date of the alleged criminal conduct may in fact work in the Defendant's favour on the basis that there may be some cynicism in respect of the delay in the Complainant coming forward with her complaint and a lack of supporting information or detail which could, in turn, make a jury uncertain about the allegation. My view was that the absence of information could also work to the Defendant's advantage. It was clear from the schedule of unused material that certain parties considered to have been at the venue in St Brelade were spoken to, either in 2002

or in 2015, and it appeared they were unable to give any material information as their statements were not disclosed and were clearly not disclosable." 58. There are two points to note about this evidence. First, it was Advocate Sette's professional opinion that a fair trial was possible. Second, it was Advocate Sette's professional opinion that the combined effect of the delay and the lack of supporting evidence might work to the Appellant's advantage. Certainly, it is the case that Advocate Sette was entitled to view the matter as he did and it is not possible to characterise his judgment as either unreasonable or wrong. In our view, for the reasons given by Advocate Sette, an abuse of process application would have met with no success. It follows that the Appellant's contention that his trial advocate should have made an application to stay the proceedings is without merit. The decision not to make such an application had no impact on the Appellant's right to a fair trial. 59. We should also add that while Advocate Sette's assessment concerning the fairness of the proceedings was made prospectively, we have the benefit of considering the entirety of the trial proceedings after the event. Having read the transcripts of the proceedings, in our view Advocate Sette's assessment proved to be accurate. We also agree with Advocate Sette's evidence concerning the Commissioner's direction to the jury on the passage of time: "The judicial direction given to the jury dealt with the consequences of delay and was, in my view, in favourable terms to the Defendant." 60. This is a reference to the Commissioner's direction which was in the following terms: "The complainant is describing events that took place a long time ago, 31 years. If you do conclude that she has given a satisfactory explanation why no complaint was made earlier, there remain some consequences of the delay that you need to bear in mind. First, memories fade. You would not expect a witness's memory of detail to survive intact after this length of time. But, if a witness does claim to have a memory of detail there may be a risk that its accuracy has been affected by the passage of time. We all have experience of distant memory playing tricks with us. You must decide whether the complainants' recollection of essential events is reliable. If, therefore, you are concerned, either about the absence of a circumstantial detail that would have assisted you to judge the reliability of her evidence, or by her claim to remember detail which you regard as unlikely after this length of time, then that is a legitimate concern, because it is relevant to the question whether the prosecution has proved its case. But, it is for you to decide whether your concern affects only a small part of the complainant's evidence or undermines her evidence as a whole. Second, you should consider the effect which the passage of time has had on the defendants' ability to respond. They did not know, until February 2016, that they would have to meet the case now brought against them. They are in no better position than anyone else to remember the details of their lives many years ago. To give an example, had the allegations been made at the time, the defendants might have been able to recall details of their movements that night or to call other witnesses who were there. That kind of inquiry is no longer available to them. If, having considered the defendants' position, you accept that they have, as a result of the delay, been placed at a material disadvantage, you should consider carefully to what extent that concern might influence your conclusion. You should bear all these factors in mind when you are deciding whether the evidence makes

you sure of the defendant's guilt. You should make your own assessment and decide what weight you should attach to them." 61. This was a careful, well-balanced direction which ensured that the jury's approach to the consequences of delay was fair to both defendants. As the English Court of Appeal noted in *R v F(S)*

- [2012] QB 703 , "for as long as juries are vested with responsibility for deciding the verdict, we must have confidence that they will make allowances for the difficulties faced by a defendant who can only say 'I didn't do it', as well as delay". In the Appellant's case the jury were alerted to the relevance of the delay and its consequences. There is no basis for us to interfere with the verdicts which it was open to the jury to return. 62. In the course of his oral submissions, Advocate Steenson also submitted that the Appellant had suffered prejudice as a result of developments in the law that had taken place since 1988. He relied in particular on two matters. First, the abolition of the need for certain categories of witnesses (including complainants in cases of sexual abuse) to be corroborated, or 'backed up', by other separate evidence (see the Criminal Justice (Miscellaneous Provisions) (No 3) (Jersey) Law 2011). Second, amendments to the law governing the admissibility of bad character evidence effected by Article 82E of the PPCE, as inserted by the Criminal Procedure (Jersey) Law 2018 . The answer to this submission is simple. In *Makanjuola*
- [1995] 3 All ER 730, the English Court of Appeal held that an enactment abrogating the mandatory requirement that the trial judge should direct the jury about the danger of convicting on uncorroborated evidence in certain classes of case, applied to any proceedings after it came into force notwithstanding that they related to acts alleged to have been done before. In *R v Bradley*
- [2005] 1 Cr App R 24, it was held that the provisions of the Criminal Justice Act 2003 which made evidence of bad character admissible on a wider basis than before, also applied to any proceedings after the relevant provisions came into force. As the Court of Appeal explained in *Warren v AG*
- [2009] JCA 175 , the underlying rationale for these decisions is that a defendant has no right to have a particular procedure followed other than that which applies by virtue of the law in force at the time when he is before the court. While the question to what proceedings and to what stages of such proceedings a new statutory rule applies is always a question of construction of the enactment in question, we have no doubt that the relevant procedural provisions were intended to operate in relation to all proceedings after they came into force (and no argument was advanced before us to the contrary). As Sumption JA expressed the point in *Warren* , *supra* (at paragraph 11): When a person commits an offence, he does not thereupon become entitled to a trial in accordance with the procedural rules which then existed. His rights under the procedural law of the court arise only when he is before the court, and they necessarily depend on how that law stands at that time." 63. It follows that we see no merit in Advocate Steenson's arguments based on alleged prejudice arising from changes made to the procedural rules in relation

to corroboration and evidence of bad character. The Appellant was entitled to a fair trial on the basis of the rules as they existed in November 2019, and his trial was conducted fairly in accordance with those rules. 64. Advocate Steenson also contended that as a result of the delayed complaint, the Appellant had been deprived of the opportunity to obtain statements which may well have been exculpatory. He suggested that such evidence might have assisted in ascertaining the circumstances surrounding the offences. He submitted that procuring evidence of the surrounding circumstances of the offences from persons who were present at the venue during the relevant weekend but from whom the police chose not to take statements would have represented "a significant and demonstrable chance of amounting to decisive or strongly supportive evidence emerging on a specific issue in the case": see RD, *supra* . 65. In our view, the Appellant's arguments are based on mere speculation. The prosecution case was that the offence had taken place in a classroom with only the Complainant, P and the Appellant present. There was some support of the Complainant's account in the form of her recent complaint and her distress during the course of the weekend. The defendants were able to address the jury on the absence of any additional supporting evidence and had the benefit of a favourable direction on the point. The Appellant has not identified any "decisive or strongly supporting evidence on a specific issue in the case" that became unavailable to him as a result of delay. And accordingly, we reject Advocate Steenson's arguments to the contrary. The Appellant's Decision Not To Give Evidence 66. As noted above, neither defendant gave evidence at the trial. Advocate Steenson now submits that the Appellant was not properly advised as to the consequences of electing not to give evidence before the jury. The written contentions (repeated before us during the course of oral submissions) put the point in the following way: "[The Appellant] does recall, however, a very brief conversation with Trial Counsel about giving evidence. He does not recall the matter being discussed extensively. His recollection is that Trial Counsel advised him that, as he had given his explanation in interview, there would be no benefit to repeating the same in live testimony. There was, to the best of his recollection, no discussion along the lines that, particularly in sex cases, juries often like to hear defendants protest their innocence. In short, the Defendant was somewhat surprised not to be giving evidence and submits that such an important tactical decision required greater thought and discussion than was actually afforded to it." 67. The Appellant's account of events is disputed by Advocate Sette. In his affidavit, he provides details of the discussions held with the Appellant in the period between April 2019, when Advocate Sette was first instructed, and the close of the prosecution case on 27 November 2019. His evidence is encapsulated in the following rebuttal of the Appellant's case: "I completely disagree with any suggestion by the Defendant that he was somewhat surprised not to be giving evidence. In my view, it was made clear from the outset that the Defendant would be unlikely to give evidence... through my countless discussions with [the] Defendant at different times during the course of the proceedings, that the decision not to give evidence was an informed one which was made in good faith after proper consideration of competing arguments. 68. We have no hesitation in accepting Advocate Sette's evidence. We also note that Advocate

Sette has provided powerful reasons to support the advice he gave, and these reasons readily explain the decision made by the Appellant. Had the Appellant chosen to give evidence, he would have been exposed to cross-examination. This would have included cross-examination on the account of events he had given in interview. This account differed from the account given by his co-accused, and on its own terms was capable of being used by the prosecution in cross-examination to his detriment. The details of his denial of the offence and his claim to have no memory of the incident would inevitably have been the subject of rigorous scrutiny. As it was, the Appellant was able to rely on his untested denials of sexual abuse. We see nothing unreasonable in Advocate Sette's advice and it properly identified the competing considerations. We accept his evidence that the Appellant's decision not to give evidence was fully informed. We see no procedural or substantive unfairness arising from the Appellant's decision not to give evidence and we reject his complaint on the facts. Trial counsel 69. It follows from what we have set out above that we do not accept the criticisms levelled at counsel who represented the Appellant at trial. In our view, Advocate Sette conducted the Appellant's case with all the care and skill that such a serious case deserved. Judicial Directions 70. It also follows that we reject the criticisms directed at the Commissioner's legal directions to the jury. They were not 'unwieldy and too complex' for the jury properly to digest, and, in our view, the contrary is the case. They were models of clarity and the product of careful thought. Furthermore, the jury had the advantage of the Commissioner's directions in writing, so they could be revisited during their discussions. There is no basis for suggesting that the guilty verdicts were the product of confusion. Disclosure 71. At the hearing of the appeal, Advocate Steenson developed an argument in relation to the failings of the disclosure process which he submitted rendered the trial proceedings unfair. In his original written contentions, Advocate Steenson criticised the absence of evidence concerning the Complainant's treatment for post-traumatic stress disorder. The complaint at that time was expressed in these terms: "It appears that the Prosecution chose not to seek to obtain any medical records and it further appears that Trial Counsel for the Defendant did not think to make an application for the same. Medical records should have been obtained and reviewed by both the prosecution and the defence." 72. This criticism was misplaced. As Advocate Sette and Crown Advocate Hollywood explained, the prosecution did obtain the Complainant's medical records and, at an early stage of the proceedings, the prosecution indicated an intention to adduce evidence of the Complainant's behaviour in the years following the sexual abuse. This was opposed by Advocate Sette. The argument in relation to the admissibility of this evidence was considered at a Case Management Hearing which took place on 20 August 2019. In the event, the prosecution decided not to pursue the application, and the formal medical records formed no part of the evidential case. This is explained by Advocate Sette, whose evidence on the point is as follows: "I had a number of concerns in respect of this information [viz, the medical records and other evidence concerning the Complainant's behaviour]. For instance, the Complainant's emotional distress would be emphasised over a prolonged period, giving rise to concerns that further credibility would be afforded to the complaint; if there was evidence of

treatment arising out of the alleged incident, it would leave the jury thinking not only why would she make this up but why would she go on ruminating about it and receive treatment over a period of time to address this; and how could I undermine this information. I formed the view that such information relating to change in emotion and thus treatment surrounding this would be unlikely to benefit the Defendant." 73. In her written and oral submissions, Crown Advocate Hollywood made clear that the Complainant's medical records were obtained and reviewed by the prosecution. She also made clear that any materials which passed the test for disclosure were disclosed to the defence in accordance with the Attorney General's Guidance 6/2019 on Disclosure of Unused Material. This is confirmed by Advocate Sette, who explained in his affidavit that the medical records were unlikely to have been of benefit to the Appellant. In his view, they supported the Complainant's assertion of emotional distress, endured over a prolonged period of time, and contained details of the extensive treatment she had received to deal with the trauma. It was for this reason that trial counsel decided not to rely on the medical records and sought instead to advance a case based on undermining the Complainant's evidence by disputing the reliability of her memory. Advocate Sette explains that this "was more likely to leave the jury uncertain, as the Complainant's account did not sound plausible and was, in my view, contrary to common sense understanding of how memory works; memory does not improve with time." 74. In our view, Advocate Sette's approach is readily understandable. Certainly, it is not open to criticism. It is apparent from the transcripts of the trial proceedings that he cross-examined the Complainant with tact and sensitivity. By avoiding the detail of the Complainant's treatment after the event, Advocate Sette was able to comment more freely in his closing submissions on the weight to be attached to her evidence concerning the event itself. We see no unfairness to the Appellant in this approach and there is nothing in the complaint advanced in Advocate Steenson's written contentions. 75. That said, at the hearing of the appeal, Advocate Steenson broadened his criticism concerning disclosure and submitted that the trial was unfair because of Advocate Sette's failure to call for and examine items in the unused material, which, according to Advocate Steenson, were potentially helpful to the Appellant's case. He gave examples of statements taken from individuals who had been present at the venue at the material time but who had no recollection of the particular weekend. Most of these individuals had provided statements for the first time during the investigation in 2015/2016. 76. The starting point of our consideration of this more expansive complaint is the evidence of Advocate Sette who produced as an exhibit to his affidavit the schedule of unused material which was served on the Appellant's legal representatives on a rolling basis in the period leading up to the trial. The final version of the schedule is dated 18 November 2019. Advocate Sette made no application for disclosure of any of the scheduled items. This was consistent with his presentation of the defence case, namely, that the complaints were untrue, and that the Complainant's evidence was implausible and that she had been inconsistent in her accounts. 77. In her submissions on behalf of the Respondent, Crown Advocate Hollywood informed us that she had reviewed the unused material and that there was

nothing within it that satisfied the test for disclosure in Article 82 of the Criminal Procedure (Jersey) Law 2018 . In other words, there was nothing which might reasonably have been considered capable of undermining the prosecution case, or of assisting the case for the defendant. Crown Advocate Hollywood also informed us that she had kept the question of disclosure under review in accordance with her duty under Article 82(5) of the 2018 law. 78. For the purpose of the appeal we can state our conclusions on this point quite shortly. First, we accept the evidence of Advocate Sette. Second, although some counsel might have called for disclosure of the actual documents, on the basis that they might contain something of value to the defence, we do not think that his decision not to seek disclosure of any of the unused material was unreasonable given the issues in the case and his understandable concern about the possible damage to the Appellant's defence if more detail emerged into the trial process. Third, we see no unfairness to the Appellant as a result of Advocate Sette's tactical decision not to take any steps in relation to the unused material. As we have noted, Advocate Sette was skilful in his conduct of the trial and his tactical decision-making is readily understandable. Accordingly, we reject Advocate Steenson's criticisms of his conduct. We also reject the argument that there must have been material within the unused material that fell to be disclosed as wholly speculative. 79. In relation to disclosure more generally, we accept Crown Advocate Hollywood's assurances. We are confident that she complied with her professional duties and having read the transcripts of the trial and all the associated documentary materials, it is apparent that she conducted the prosecution with commendable fairness. By way of postscript, however, we would wish to emphasise the vital part disclosure plays in the trial process and the importance of strict compliance with the Attorney General's Guidance, 6/2019. The process of disclosure should not proceed on the basis of assumptions (for example, that a witness who has no recollection of events is on that basis alone a witness who can be of no material assistance) and prosecutors and defence counsel must be astute to ensure that the process of disclosure is the subject of rigorous scrutiny. Summary of our Conclusions 80. For the reasons set out above, we reject the arguments advanced on the Appellant's behalf by Advocate Steenson. The Complainant gave evidence over the course of two days. Her evidence was accepted by the jury as truthful and reliable. The criticisms of Advocate Sette are misconceived. He exercised his professional judgment not to advance an argument seeking a permanent stay of the proceedings on the grounds of abuse of process. This was a reasonable decision in all the circumstances. In our view any such argument would have been unsuccessful. But in any event, the decision of trial counsel was not wrong, and the Appellant has suffered no injustice. Moreover, viewed retrospectively the trial was in all respects fair. Similarly, the decision of trial counsel not to make an application for severance was entirely reasonable. The Appellant has suffered no prejudice as a result. We agree with Advocate Sette that such an application was destined to fail, but as with the abuse application this is not the real point. Advocate Sette's decision cannot be characterised as erroneous; nor did it lead to an unfair trial. The Commissioner's directions properly addressed the issue of delay and properly distinguished between the defendants' cases. The admission of P's previous convictions

was the subject of proper direction. The Appellant's decision not to give evidence was fully informed and there was no unfairness caused by the process of disclosure. 81. In our view, the Appellant's real complaint is that he disagrees with the jury's verdict. The appeal against conviction is dismissed. Authorities Court of Appeal (Jersey) Law 1961 Police Procedures and Criminal Guidance (Jersey) Law 2003 Court of Appeal (Jersey) Law 1961 AG v Edmond-O'Brien

[2006] JLR 133 Criminal Procedure (Jersey) Law 2018 R v Hanson

[2005] 1 WLR 3169 Lord Hope in Montgomery v Her Majesty's Advocate

[2001] 2 WLR 779 . R v Moghal [1977] 65 Cr App R 56. R v X [2012] EWCA Crim 2276 Warren v Attorney General for Jersey

[2012] 1 AC 22 Warren v AG

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[2012] QB 703 RD

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[2001] 1 WLR 1293 W v AG [2015]1 JLR 29 R v F(S)

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