

JERSEY / JUDGMENT

Queree -v- AG [2018] JRC 014 (18 January 2018)

[2018] JRC 014

Source: bailii.org · Research copy typeset by Esheria. Not court-issued or certified.

JUDGMENT

THE BAILIFF:

Introduction

1. The Court sat on 4 th January, 2018, to receive an appeal by the appellant against his conviction by the Magistrate on one charge of indecent assault on a female person, to whom we shall refer as X. The trial took place on 31 st August, 1 st, th and 6 th September, 2017, in respect of the alleged assault which is said to have taken place on 20 th August, 2016. The Magistrate gave her decision on 6 th September and handed down her reasoned judgment on 6 th October. The appellant was sentenced on 9 th October to 180 hours' community service with 12 months in custody as the default sentence, and ordered to pay £2000 towards the costs of the prosecution. In addition, by reason of the conviction, the appellant was subject to the notification requirements under the Sex Offender (Jersey) Law 2010 and the Magistrate fixed the minimum period of five years before which an application could be made for having those requirements dis-applied to him. In addition, the Magistrate made a restraining order prohibiting the appellant from having any contact direct or indirect with X or from entering any part of the premises known to be her home address or workplace or loitering within 50 metres of it. Having heard counsel for both parties, the Court on appeal set aside the conviction and discharged the appellant from further process. As a result of those orders, the order for costs in favour of the prosecution is also discharged, and of course it follows that the orders under the Sex Offenders Law are also discharged. Summary of facts 2. Much of the factual context was agreed. X and the appellant had met through a dating website called Tinder, and had started messaging each other at the beginning of August 2016. They communicated regularly, and had their first meeting on Wednesday 17 th August when they went for a drink at the Adelphi. The appellant was a mature student, then aged 36, in the third year of study at a London medical school. He was staying with his parents during the summer holidays. X was a doctor working in Jersey. On that first evening, they had dinner in Colomberie and then went to other establishments, dancing, drinking and talking. They were affectionate with each other and indeed the meeting and the evening went very well indeed for them both. There was further communication by text message the

following day and on Friday 19th August, they met for a walk and the appellant then took X out to dinner. Again there was conversation which was warm and affectionate on both sides. After dinner, the appellant left his car in Gorey where they had been dining (X kept the key in her handbag) and they went into St Helier, visiting various establishments and again drinking, dancing and talking. They were affectionate with each other, kissing and laughing. According to X, in one or more of the establishments, the appellant slapped her backside hard on a couple of occasions. The appellant did not think that had happened. At all events, on the first occasion she laughed this off and both of them talked about previous relationships and the possibility of a relationship between the two of them in the future. The appellant told X he would prefer it if she did not use Tinder in the future, and that they should date exclusively with each other. This was agreed. He had told her how much he liked her, and she said the same. At the end of the evening, it was agreed that he would stay at her flat and when they got there, she poured a Baileys drink for each of them. It appears that neither drank all of it but there was kissing and without any further discussion they both got undressed. It was implied that they were going to have consensual sexual intercourse, and this then followed. 3. They moved onto the bed and had vaginal intercourse initially with him on top, and then with her on top. He was not wearing a condom and was concerned to avoid pregnancy. According to him, he did not realise that she was on the contraceptive pill. At all events they both agreed to unprotected sex. There is no dispute between them that during the first period of vaginal intercourse, there came a point where she fell from the bed and caught her arm on the bedside table. According to him, they laughed it off at the time, although it appears from subsequent evidence that she had a sore shoulder as a result. Immediately after that she beckoned to him to come over to her, offering and performing oral sex on him. After a time, she stopped and they resumed vaginal intercourse, the complainant again on top. Subsequently, he performed oral sex on her before they had further vaginal intercourse, again with her on top. At the end of that sexual activity X went to the bathroom to have a shower. When she returned to the bedroom, the appellant had dressed and subsequently he left. 4. The appellant had, unknown to both of them, left his mobile telephone in one of the nightclubs they had been in. X however sent him four text messages in short order that night, immediately after he had gone. The first was at 2.41, in which she said:- "Please come back. I can't even put into words how much I like you and the last thing I want to do is hurt you xxx." This was followed up at 2.42 with a text message which said:- "I literally haven't met anyone I've liked as much as you in years". The next text was at 2.44 and simply said:- "Phil please just come back xxx". Finally at 2.48, the last text said:- "I did come out looking for you but you'd gone." 5. Those facts are all agreed. It is now necessary to fill in the gaps with the evidence giving rise to the allegation of indecent assault. 6. According to X, during the first period of sexual intercourse, the appellant kept grabbing at her breasts really hard. He was quite forceful. As a result of this, she being on top, she tried to roll over and in fact fell off the bed. She did not tell the appellant that he had been too forceful with her breasts, but when she got up from the floor, she decided to give him oral sex. She gave evidence that again he was quite forceful, and it felt "like he was forcing his penis in quite hard and he had hold of my head and was pulling my hair". She felt

in a bit of pain, and so she stopped. She got on the bed again and they had further sexual intercourse, again her on top and again the appellant apparently grabbed at her breast really hard. She rolled off him onto her back and she burst into tears. She said that she felt he had been rough with her. She said that he apologised and would be gentle and that she told him she had never experienced anything like that before in her life and she had never previously been in pain in her breasts during intercourse. However they agreed to continue intercourse. She had asked him not to "grab at my breasts" because she was in a lot of pain, and he had agreed to be gentle. 7. The intercourse continued, again with X on top. Notwithstanding what she had said to him, she said the appellant grabbed her breasts again and shortly thereafter they stopped. The appellant then gave her oral sex but she said that she did not like that much and she told him that she wanted to go back to what she described as "normal sexual intercourse". They carried on, and again he grabbed at her breasts really hard, and she turned away and stopped. She said she was upset and felt that he had been rough with her. She said he did not comment but looked a bit annoyed. She told him that up to that moment she thought they had been good for each other but now she was not so sure and she went off to have a shower. As she had the shower, she could see that red marks and bruising were appearing on her left breast and she was in a lot of pain even at that point. On her evidence, she came out of the shower in a towel and found the appellant had dressed. He announced he was going home. She showed him the marks on her breast and said that she was already starting to bruise. According to her, he looked defensive and angry and said that he had had "far rougher sex than that". She said "Don't go" and she really wanted to discuss what had happened between them although it is unclear whether she told him this. She had his car key in her handbag from the arrangements they had made previously and he asked for it back. As she handed him the key, she said that his demeanour changed and his eyes welled up with tears and he said to her that he needed "to go now and think about what I've done to you". However, his demeanour then changed again and he became really angry as if he had been caught out. All this came as a great shock to X, who could not reconcile the sexual activity and behaviour afterwards with the charming and gentle person that she thought she had met, and she sent the various text messages described above. 8. According to the appellant in his evidence, he said that he liked X very much - indeed he had proposed that they stopped using dating applications because he was going back to the United Kingdom the following week and he was keen to let her know that he would be happy if they agreed that neither of them should look for other partners in the interval before they met again. When they got back to her flat, they drank a little of the Baileys, but then started kissing and ultimately this led to them removing their clothes and having consensual intercourse, initially with him on top and subsequently with her on top. In the course of the intercourse he touched her breasts and kissed her. He agreed that at one point she fell off the left hand side of the bed, which caused them both to laugh. She beckoned him over to her and she was on her knees and performed oral sex on him. He thought he was touching her hair and stroking it rather than pulling it and he said that she had not complained that he was being too forceful. In his evidence he said that she continued to have sex with him and she never said that she was not enjoying what they were doing. The intercourse was,

using his language "vigorous" and he said that he thought it was "just normal excitable passionate charged sexual intercourse between two people who were having their first sexual encounter". He was shocked to hear the evidence which X gave in court to the effect that she was in fact having a pretty horrible time during that sexual activity. He said that he was taken aback that two people could have such a different experience of what they were doing together. He agreed that he performed oral sex on X while she was on all fours, and thereafter they resumed vaginal sexual intercourse. He agreed he was again touching and fondling her breasts. He agreed that, at one point only, X asked him to be more gentle. He said that she was not specific with regard to her breasts or the intercourse. She did not tell him to "stop" and she did not move away. She just asked him to be more gentle, which he tried to be. He denied that she was crying. She said she needed to go to the bathroom and she stayed there about ten minutes - longer than he had expected. When she came out he was dressed and told her he was thinking about going home because, according to him, it seemed reasonable to do so as she had to go to work the following day and he thought also that his parents, who might meet X in the future, would not be very impressed if he had returned home at midday after a date with someone he had met only on the Wednesday before. Accordingly he kissed her on the cheek and told her that he would text her when he got home. He did not realise that he had left his mobile telephone in the nightclub, and so he would be unable to do so, and indeed he did not pick up the texts which she sent him. He denied that he had slapped X three or four times on her backside while they were out in the nightclub and other establishments, as she had asserted in her evidence. 9. After X had sent the texts and had no reply, she went to bed. She has a good relationship with her mother, and indeed had told her in detail of her developing relationship with the appellant, including in fact telephoning her mother at midnight on Friday th August to tell her how well things were going. At about 7am on Saturday 20 th August, on waking up, she telephoned her mother and told her what had happened the night before including most of the details of what had happened during the intercourse - how rough the appellant had been, how he had pulled her hair, how he had grabbed at her breasts and including her confronting him about the rough sex and his reply that, with his eyes welling up, he needed to go and think about what he had done to her. After that, she telephoned a good friend, Dr A, who she thought was a sensible person and one she could trust. She explained that she was really upset with herself for not insisting on the use of a condom and she was concerned about the appellant's behaviour and whether she was at risk of a sexually transmitted disease. She explained how she had fallen for him, and then about the sex itself. She later went to work. She felt flat all day, and really low in mood, and indeed she burst into tears when she left work. As soon as she reached her home again, she telephoned her mother and sobbed "pretty much uncontrollably" for two hours. Her mother told her that she should take some Migraleve, which helps with migraines and that she should get a good night's sleep and see how things were the following day. So she went to bed at 10pm on Saturday th August, and unfortunately did not sleep particularly well with, as she described it, pain in both her breasts and her left shoulder had also stiffened up. When she woke the following morning she felt different. She remembered thinking to herself that "Oh I feel like I've been

assaulted". There were bruises now appearing on her breasts and she had difficulty putting on her bra. She took photographs of herself and sent them to her mother to ask whether she was making a fuss about nothing -her mother was very upset for her, but her main concern was about the breast tissue and whether there was any injury to it. Her mother told her to see one of the doctors in Accident and Emergency. 10. According to X, she was not so much troubled by the possibility of damage to the breast tissue, but she did not feel fit to work. When she arrived at work, she saw her supervisor, and when she approached her, the tears just started. She was taken into a side room and X explained how she thought she had been assaulted although she was concerned she might be making a fuss about nothing. Her supervisor suggested she should call the police firstly because X had been injured and because X had told the supervisor that the appellant had asserted he had had far rougher sex before. According to X, her supervisor said that based on that alone, as a doctor, X had a duty to report it and accordingly X allowed her to call the police. We will return to the police investigation later, but it is enough at this point to say that X was then examined by Dr French, one of the Force Forensic Medical Examiners and photographs of bruising were taken by Detective Constable Mark Grieve. Selected photographs were put in the bundle before the Court and as the Crown did not seek to put any other photographs before us, we have assumed that the ones shown to us are representative. There is no doubt that the photographs show some bruising to both the right and left breast

- the bruising on the right breast is around and above the nipple, relatively light, but sufficient to see what could be finger marks, and the bruising to the left breast is on and around the nipple and much more severe. 11. The court below heard evidence from Dr French, who took a medical history from X as a result of which she noted that X suffered from migraines and hypothyroidism, which is low levels of the thyroid hormone, for which she took medication. She noted that X could not easily lift her left arm, and suffered pain from the left breast and the left arm in particular. In Dr French's opinion, the bruising on the breasts was consistent with the description which X had given her of the appellant's grabbing of the breasts during intercourse. There were no visible marks on the buttocks, but a small brown bruise on the upper left thigh. There was a good deal of cross-examination of both Dr French and subsequently Dr Barrett, another forensic medical examiner as to whether the hypothyroid condition meant that X was liable to bruise easily. Both doctors confirmed that easy bruising might well be a symptom of low or very high thyroid hormone levels, and it was therefore a diagnostic feature of an untreated condition, but that was relatively uncommon and in their view bruising was not indeed a common diagnostic feature of hypothyroidism. As their evidence goes to untreated hypothyroidism, that would not seem to be relevant in so far as X was concerned. 12. Dr Barrett is also an expert in general forensic medicine. He did not examine X, but he did review the findings of examination by Dr French and all the other material supplied to her. He concluded that there was no evidence that the bruising sustained by X was as a result of any self-harming. As to easy bruising, he did not consider that there was likely to have been a clotting problem because if that existed, one would expect it to come out during childhood. Without concluding that X

was tender in the left shoulder, because he had not examined her and could not see tenderness in a picture, he nonetheless thought that if there was tenderness, that could have been caused by the falling off the bed. He was cross-examined at length about the connections between hypothyroidism and easy bruising, but he gave essentially the same expert view as had been expressed by Dr French. 13. The appellant was arrested at his mother's birthday party at about 5pm on Sunday 21 st August and was interviewed between 9.20 and 10.20pm. He gave full answers to the questions which he was asked, and did so without a lawyer being present. He agreed that there was no sign of bruising before they started having sex. He could not understand why there should be that bruising but he did not believe he could have caused it. He said that there had never been a problem of that kind with any of his previous partners. As far as he was concerned there was not any particular issue arising from the night, and he was expecting to go round to see X again either that night or the following day, and he would have expected "a normal reaction from her". 14. The Magistrate received all this evidence at trial. She also heard from X's mother directly. She described her daughter as reserved, and that she had never heard her so happy and positive about meeting someone as she had felt on meeting the appellant, and that she had high hopes for a relationship with him. Because they got on so well, her mother thought she was devastated when things went wrong that evening. She told the Court that when X telephoned on the first occasion at 7am, X had told her that X was not sure whether the appellant had meant to do what he had done - in other words she was not sure whether the appellant had assaulted her deliberately, or if he had just forgotten himself in the course of consensual sexual activity. The Magistrate's decision 15. In her reasoned judgment the Magistrate noted that there was a recusal application, grounded upon the premise that she had dealt with pre-trial applications in the case. Advocate Steenson had submitted to her that it would be better if another Magistrate would sit. The Magistrate correctly identified the test for recusal, which is whether in all the material circumstances a fair minded and informed observer would conclude that there was a real possibility that the judge was biased - see *Syvret v Attorney General*

[2009] JCA 181 . She found that a fair minded and informed observer would not reach that conclusion in this case and therefore she presided over the trial. 16. Her judgment then deals with the background and the issues in the case, which are identified at paragraph 17 of her judgment as threefold:- (i) Whether the appellant had grabbed X's breasts after she had told him not to do so. (ii) Whether he did so knowing he no longer had her consent. (iii) If (i) and (ii) are proved, whether such touching was in circumstances of indecency. 17. She correctly identified the burden and standard of proof. 18. She then went on to identify the law which she described as follows:- "The definition of assault in Jersey law is to be found in *AG v Vaughan* (unreported Royal Court November 1974). An assault can include a laying on of hands in a hostile manner. The law was further examined by the Jersey Court of Appeal in *De la Haye v Attorney General*

- [2010] JCA 092 and was said to follow closely the English law of assault. In this case it was agreed that D would be guilty of assault if the court were sure that D touched [X's] breasts when she did not consent to her breasts being touched and that D knew she did not so consent. Such touching would, in these circumstances, amount to hostility and so to an assault." 19. As to the Magistrate's analysis of indecency it was as follows:- "20. An assault in circumstances that right thinking people would consider indecent is an indecent assault. This is an objective test. The defence questioned whether touching [X's] breasts without consent but in the context of continued consensual sexual intercourse could be said by right thinking people to be indecent.
21. A woman's breast are an intimate and sexual part of her body. It follows that touching the breasts can be seen by right thinking people to be indecent but this depends very much on the circumstances. Consent or the absence of consent can be a crucial factor in determining whether the touching is in circumstances of indecency.
 22. [X] had given consent to sexual intercourse and therefore had impliedly given consent to her breasts being touched in a sexual manner. By her account she later specifically withdrew consent to her breasts being touched ['grabbed'] even though she continued otherwise to consent to sexual intercourse. [X] says that she consented to some sexual touching but expressly not to all sexual touching. She said that D continued to grab her breasts despite the withdrawal of consent and in the knowledge that consent had been withdrawn.
 23. In my view right thinking people would consider an assault to be in circumstances of indecency when a person touches an intimate and sexual part of another person's body in a sexual way without their consent and knowing that they did not have consent, irrespective of whether consent had been given to other sexual touching. I find that if there was an assault as alleged by [X], it would amount to an indecent assault." The grounds of appeal 20. The grounds of appeal filed by Advocate Steenson on behalf of the appellant were as follows:- (i) The Magistrate erred in admitting the evidence of X's supervisor. (ii) The Magistrate attached too much weight to the evidence of X. (iii) The Magistrate failed to attach any or significant weight to the evidence of the appellant. (iv) The verdict was against the weight of the evidence. (v) The Magistrate erred in finding the defendant guilty of the offence of indecent assault. (vi) The Magistrate erred in her interpretation of the expert evidence of Dr Barrett as to whether X might be a person who bruises easily. (vii) The Magistrate erred in failing to recognise that it would have been preferable for a judge who had not had all the prosecution papers to have been the trial judge. Discussion 21. Some of these grounds of appeal can be dealt with in relatively short order and we take the last point first. We deal with it because it was in the grounds of appeal but we note that Advocate Steenson did not seek to address it in oral submissions. 22. In our view the learned Magistrate was absolutely right in identifying the test which had to be applied. As would be expected, no question of actual bias arose and the test was whether the fair minded and informed observer would conclude that there was a real possibility that the judge was biased. The argument for recusal was put upon the basis that the Magistrate had sat on pre-

trial applications and might well have seen material which would be difficult to put from her mind. We think there is nothing in these objections. Magistrates will frequently have to deal with pre-trial directions, just as judges in the Royal Court have to deal with directions hearings before the trial itself. It would be extremely inconvenient to arrive at a position where the judge dealing with the pre-trial directions was unable to deal with trial and it would disconnect the preliminary hearings from the trial itself, which is, in principle, undesirable. Furthermore it is unnecessary. In our judgment, it is neither necessary nor appropriate that a professional magistrate recuses herself from presiding over the trial merely on the grounds that she has seen some material prior to trial in respect of directions hearings of one kind or another. 23. The submission that the Magistrate erred in admitting the evidence of X's supervisor is also not one which finds any favour with us. The issue arose in this way. The evidence which the supervisor was to give is broadly summarised in paragraph 10 above. It was, apparently after argument, evidence which was ordered to be admissible as evidence of recent complaint and therefore admissible notwithstanding that it is hearsay. No criticism of that decision has been advanced on appeal. However, it turned out that at trial a medical certificate was provided for the supervisor indicating that she would not be fit for at least three months to attend court. In those circumstances the prosecution sought to have her statement admitted as evidence of any fact of which direct oral evidence by the person would be admissible pursuant to Article 64 of the Police Procedures and Criminal Evidence (Jersey) Law 2003, the witness being unfit to attend. Advocate Steenson objected before the learned Magistrate at this proposed course of action. He made some criticisms of the statement, not the least of which was that it was first given almost a year after the incident, and he was clear with the Magistrate that he wanted to have the ability to cross-examine the deponent on a number of points. 24. The Magistrate concluded that it would not be unfair to admit the statement. She noted it was an original document, and the circumstances which gave rise to the supervisor's knowledge of what she recorded. With one qualification, in respect of which she ordered part of the statement to be redacted, she concluded that the statement was admissible not as to the truth of the content of it, but as evidence of recent complaint. It appears to us that the learned Magistrate went about her assessment in a perfectly reasonable way. We cannot identify any point of principle where the learned Magistrate in this respect can be said to have gone wrong, and we therefore dismiss this ground of appeal. 25. Before leaving it, however, we just have one or two comments in relation to the police investigation as a whole. Advocate Steenson submitted that the police notes of the initial meeting with the complainant (DC Garnier) were not disclosed to him until the middle of the trial and also he reminded us that the appellant was arrested before any statement had been taken from X at all. When one combined that with the fact that the supervisor's notes were not written up until April and her witness statement a couple of months after that, the whole picture was one of uncertainty. He was at pains, however, to say that he was not inviting us to decide the appeal on this basis. We say at once that we think he was right to make that concession. Where there is criticism of the procedures which have been adopted by the police, that criticism can be used to support a conclusion that the finding ought to be one of not guilty, but one

really does have to be able to point to some injustice, or at the very least a practical difficulty which might have caused injustice, before much time will be spent by an appellate court on the matter. In this case, the defence was able to cope without too much difficulty with the various actions of the police which it criticised and while we can see that this might have been irritating, we do not think it adversely affected the justice of the trial. No doubt the police will be reviewing their procedures as a result of the criticisms which Advocate Steenson makes - and we add that we do not think he was necessarily wrong in making them. Nonetheless they do not form a basis for allowing the appeal. 26. As to Dr Barrett's evidence, we think his focus was on whether any easy bruising would be a consequence of X's admitted hypothyroid condition and he concluded that it would not. This does not mean, as it seems to us, that the Magistrate was entitled to conclude X did not bruise easily, if she did so conclude, but we do not think this is material to the appeal. 27. We now turn to the complaints that too much weight was given to the evidence of X and insufficient or any weight was given to the evidence of the appellant. This is a difficult area for any appellant on appeal. As was said in *Graham v Attorney General*

[2013] (1) JLR 91 at paragraph 17, the Royal Court does not on appeal lightly interfere with a decision on the facts where the transcripts reveal that there was evidence upon which the Magistrate could properly have come to the conclusion which she did. That approach reflects the fact that the Magistrate is in a better position than the Royal Court because she has had the advantage of seeing and hearing the witnesses giving their evidence. In this case, the Magistrate unequivocally found X to be a compelling, coherent and honest witness, and D to be an untruthful and unreliable witness. In that connection, Crown Advocate Yates pointed to an extract from the transcript where, in summing up, Advocate Steenson said this: "But you have clear and unequivocal evidence presented by Mr Querée, who wasn't in a single way, in my submission, undermined in cross-examination. You might have thought that he came across as being rather pedantic and perhaps even a little bit cocky, but he answered all of the questions put to him, even though they were sometimes difficult to discern, you might think, factually in a way which didn't undermine his case, not a jot." 28. So it is said that even Advocate Steenson, acting for the defendant, recognised he had not given evidence well. 29. We will return to the evidence of X and the appellant in so far as material to the issues in this case later in this judgment but we make the more general observation at this stage that while there is definitely a place for a judge to place some store on his or her instinct or personal reaction to the witness giving evidence, one must always be wary of that approach, testing it rigorously against what the witness actually said and the extent to which what he or she said can be borne out or supported by other evidence in the case. In this case the learned Magistrate believed what X had to say and disbelieved the appellant, but it is not clear whether there was really any evidence which supported the view that the appellant was not a credible witness. The three members of this Court have individually read the transcript of the appellant's evidence before the learned Magistrate and each of us independently reached the conclusion that his evidence held together well, was credible and comprehensible. By

contrast, as the Magistrate herself accepted in her judgment, some aspects of X's evidence might be thought to be illogical, and perhaps, critically, there is no real explanation for why X was unsure whether the defendant had grabbed her breasts deliberately when she first spoke about the incident, and only later was completely sure that he had done so deliberately. As a result, we are not unsympathetic to the approach taken in *Rushton v Attorney General* [Royal Court October 16 th 1989 Unreported] where the Court indicated that if there was evidence upon which the Magistrate could have come to the decision he or she did, the Court does not lightly interfere - in other words it will interfere sometimes, especially so where, as said in *Graham*, there was a lurking doubt or sense of unease about the finding of guilt. In this case, we have had a similar sense of unease, and it is compounded by an analysis of all the evidence against the relevant law. Discussion 30. We start with the law as to assault. In his directions to the jury, Ereaud DB summed up the law on assault in the case of *Attorney General v Vaughan* in November 1974 as follows:- "I am going to begin by telling you the meaning of 'a grave and criminal assault'. Now, in Jersey law, an assault is a touching or laying hold by one person on another in an angry, revengeful, rude, insolent or hostile manner, and it includes an attempt to do so, provided that the person who is threatened is led to anticipate an attack. In the United Kingdom an attempt to do those things is called 'an assault' and the actual doing of those things is called 'a battery'; but here we make no such distinction, we use the same name both for an attempt and for the actual doing of the thing; they are both equally called 'assaults'. In Jersey law assaults can be of two kinds. They can either be a common assault, which is the less serious of the two kinds of assault, or they can be a grave and criminal assault which is, as its name implies, the more serious type of assault, and the only difference between them is one of degree." 31. That direction was described in *Whelan's Aspects of Sentencing in the Superior Courts of Jersey, Second Ed* (2003 issue) as the *locus classicus*, but it is important to remember that in any summing up, the trial judge directs the jury on such of the law as is relevant on the facts to the case which that jury has to consider. It clearly was not an issue in that case or the learned judge would have included a direction on it, but we add that, certainly in the case of common assault, the consent of an adult victim also provides a defendant with a defence. Nonetheless the *actus reus* of the offence of assault is in our judgment correctly summarised by Ereaud DB in that case, and mirrors the definition of a deliberate battery in England. 32. The Crown must also prove the necessary criminal intent, or *mens rea*. This requires, in cases of assault, the Crown to prove that the touching or laying hold of the person was in an angry, revengeful, rude, insolent or hostile manner where the Crown sets out to prove that the offence was committed intentionally. Consent on the part of the victim would negate that, at least in cases of common and indecent assault. If a defendant deliberately touched the victim knowing she did not consent, then it can be said he touched her in a rude or hostile manner. However it is also open to the Crown to prove that the offence was committed where the state of mind was reckless and not intentional

- see *De la Haye v Attorney General*

[2010] JLR 218 . That is perhaps of interest in as much as the question of recklessness was clearly one which might have arisen in this case, but it did not do so. This is because the prosecution put its case firmly upon the basis that it was an intentional assault, one which was angry, revengeful, rude, insolent or hostile. As the learned Magistrate said at paragraph 130 of her judgment, "The question of whether he was reckless as to whether she consented was not addressed". 33. An assault, if proved, becomes an indecent assault where it takes place in circumstances of indecency. Indecency 34. As is set out above, the Magistrate's conclusion was that a woman's breasts are an intimate and sexual part of her body and, if she does not consent to the defendant touching them, the touching is indecent. We have some serious reservations about that analysis which may well cover many alleged offences but in our view is not sufficiently complete. The learned Magistrate was right to identify earlier in her judgment that the question of indecency depends on all the circumstances. What were the circumstances here? They were that:- (i) X and the appellant were engaged in full consensual intercourse where, as the learned Magistrate identified, consent to sexual intercourse impliedly means consent to the touching of the breasts in a sexual manner. (ii) Although X was apparently in pain following the appellant's grabbing of her breasts on the first occasion, she made no complaint about that and indeed gave him oral sex before returning to vaginal intercourse. (iii) Following her request to him (accepting X's evidence for these purposes) not to grab her breasts during that second session of vaginal intercourse, she asked the appellant to be more gentle and he said he would. There was further oral sex, this time by him on her. Following that, there was further vaginal intercourse, again at X's instigation. 35. The question of consent, or what was actually said and what the state of mind of the appellant actually was will be matters to which we will return later, but, on the face of it, it seems to us to be wrong to say that where two adult people of full capacity are naked in private and engaging in consensual sexual intercourse, the circumstances are indecent. In our view, right thinking people would not consider those circumstances to be indecent, and the fact that an intimate and sexual part of the body is touched during that intercourse does not in our view change the circumstances. 36. The learned Magistrate reached the view that the nature of the circumstances changed because X withdrew her consent to having her breasts touched thus conflating consent with indecency. We will turn to the evidence in that connection shortly, but assuming that that was so, the lack of consent does not in our view necessarily change the overall circumstances. Those overall circumstances remained that, even after consent was withdrawn to the touching of the breasts, if it was, there remained consent to full intercourse and other sexual activity. In our view, right thinking people would regard that circumstance continuing as one which was not indecent, and though the touching might amount to an assault, it would not be an indecent assault, even though it was a touching of the breasts. 37. Conversely, of course, the touching of a sexual and intimate part of a woman's body such as the breast in other circumstances without consent may be an indecent assault, simply because the circumstance of consensual intercourse does not apply. 38. Advocate Steenson submitted that the charge of indecent assault was the wrong charge in any event. He contended that the right charge would have

been a grave and criminal or alternatively common assault . This was the approach which he said would have been taken in England and he referred to Allen's Textbook on Criminal Law, 9th Edition and in particular to the case of Brown (1993) which concerned five appellants convicted of assaults occasioning actually bodily harm, contrary to Section 47 of the Offences Against the Person Act 1861 ("the 1861 Act"). The incidents which led to the convictions occurred in respect of consensual homosexual sadomasochistic activities which involved no permanent injuries nor was medical treatment required for any of the participants. The House of Lords reached a conclusion, by a majority, that consent was a defence to a charge of common assault but not to an assault occasioning actual bodily harm or serious bodily harm or a wounding unless a recognised exception applied. 39. Of course we do not have the distinctions between common assault and those assaults under Sections 47 and 61 of the 1861 Act and in Jersey there is only a common assault or a grave and criminal assault. The point that Advocate Steenson emphasised to us was that in Brown , it was not an indecent assault charged but an assault contrary to Section 47 of the 1861 Act. Indeed he submitted that there were no occasions which either he or the Crown had been able to find where an indecent assault had been charged in circumstances where consensual sexual activity was taking place. 40. It is not an easy proposition to establish that simply because a charge has not been brought before in particular circumstances, it is not capable of being brought and found proven; but we acknowledge nonetheless that given the variety of sexual preferences which exist in human kind, the Courts are liable to be cautious in taking the criminal law into consensual activity between adults in the bedroom. There are times when that is clearly appropriate - for example when, even during intercourse, the woman's consent is clearly withdrawn. Caution, therefore, does not mean that the criminal law does not go there; but it does mean that a clinical examination of all the circumstances is required as well as a careful evaluation of the possibilities - that a defendant's explanation may be correct; or that consent was given or that the extent of the injury was such that consent is no defence; or that the requisite intention has not been established. If a charge of common assault had been brought - the bruising in this case does not seem to us to have been such that a charge of grave and criminal assault could have been justified - there could have been a different enquiry below, including no doubt into the question of recklessness. Intention 41. The learned Magistrate correctly found that consensual sexual intercourse carries with it an implication of consent to a touching of the breasts. She said later in her judgment that she could not be sure that the appellant knew that X did not consent to his touching her breasts with the level of force which she found that he in fact used, at all events until such time as X complained. Furthermore, she acknowledged, rightly, that the bruising which X sustained to her breasts could have been caused by the appellant's touching of her before she complained - or indeed after she complained. There is no way of telling, and no evidence, and the appellant must have the benefit of the doubt in that respect. 42. The Magistrate found proof of criminal intent in so far as the appellant touched X's breasts after she had told him to stop. The analysis which she used to get to that position was as follows:- "The degree of force used by D was sufficient to cause bruising. I find [X's]

evidence that it was very painful to be credible. I also find it credible that at some stage [X] would have told D to stop touching her breasts. She says that she withdrew her consent for D to touch her breasts and communicated this clearly to D. She cannot be mistaken on this point, either she said it, or she is lying.

132. I have found [X] to be a reliable, honest and rational witness even when describing her own confusion. [X] has been consistent in saying that she told D to stop but he carried on, ever since she made the first complain 4 hours after the incident." 43. Because the Magistrate found that X was not lying - she was reliable and honest - she reached the conclusion that X not only withdrew her consent for the appellant to touch her breasts but also that she communicated this clearly to him. As a matter of logic, we do not think that necessarily follows. It is perfectly possible to withdraw consent without communicating that clearly. If it were not communicated clearly, then the whole premise from which the inference as to the appellant's intention falls. 44. The learned Magistrate was clearly impressed with X's evidence - in particular that X felt she was falling in love with the appellant and that he had been very open with her, charming, charismatic and generous. She thought that they were at the beginning of a relationship which she wanted to continue; and that this is the explanation for conduct on her part which might otherwise be considered to be inconsistent or illogical with the complaints which she made. There was no assessment of the appellant's approach to this burgeoning relationship. Yet all the evidence suggests that the appellant approached the relationship in just the same way as X. For him, as much as for her, it was a relationship which developed quickly. It was he who suggested that they should both stop using the Tinder dating application and commit to a relationship with the other notwithstanding that they would be apart. Why would one conclude he acted in an "angry, revengeful, insolent, rude or hostile" manner?" If, during the consensual intercourse, things were not going as she would have wished because of the forceful way in which the appellant grabbed her breasts, she nonetheless initiated oral sex on him which must have given him the signal, albeit she did not intend it, that things were going well. Although she asserts in her evidence that the oral sex was also a disaster, she nonetheless returned - at her instigation - to consensual vaginal intercourse, which again must have reinforced the signal that things were going well. It does not seem to us that even if she had withdrawn her consent for the appellant to touch her breasts and even if she thought she had clearly communicated this to the appellant, it necessarily follows that this was a message which he received. The absence of any analysis by the learned Magistrate in this connection leads us to think that she misdirected herself in this respect. 45. Our view of this is borne out when one actually looks at the evidence which was given. It appears to us there is an important distinction between a statement by X that he must not "touch her breasts" or, by way of alternative, that he must not "grab her breasts". Her evidence in chief was that during the first session of consensual intercourse, he "kept grabbing at my breasts". The conversation which she had with him later (after the oral sex and after the resumption of vaginal sexual intercourse during which, she said, the appellant grabbed her breast again) was as follows:- "I burst into tears and I was crying and I said that I, that I felt that he had been rough with

me. He did apologise and said that he would be gentle and I said that I'd never, I'd never experienced any, anything like this before in my life and that I'd never been in pain in my breasts during sexual intercourse. I, I, the only way I can explain it is that I didn't really, I thought well, maybe I am overreacting, but I knew that I was in a lot of pain, so we agreed to continue, continue having sexual intercourse We agreed to having vaginal sexual intercourse, but I asked him not to grab at my breasts because I was in a lot of pain, and he agreed not to do so and that he would be gentle with me ... we then continued having vaginal sexual intercourse. I believe I was once again on top of Mr Querée and he grabbed at my breasts again uhm and I moved, moved positions to try and, well obviously I was in pain. At this point, I was in severe pain so I moved. He was also still grabbing my hair. Don't get me wrong, clumps were not coming out or anything, but it hurt. It hurt with someone pulling your hair. Prosecution: So you had, you continued to have vaginal intercourse? Witness: Yes, that's correct." 46. X then went on to describe the oral sex performed on her by him, and then how the vaginal intercourse was resumed:- "Prosecution: And so did he continue then? Witness: And so yeah, he carried on, but then he grabbed at my breasts again really hard, by which point I cried out as he had been so rough and I, I turned away and stopped." 47. In her conversation at 7am with her mother, X again referred to the appellant "grabbing at my breasts". 48. X then phoned Dr A where it seems that her main worry was their failure to use protection, and whether she was at risk of a sexually transmitted disease. Over the next 24 hours, X's view of the incident had developed. She was no longer unsure as to whether the appellant had done what he had on purpose and now she considered she had been assaulted. In summary, there is nothing in her evidence in chief which suggests that X told the appellant that he was not to touch her breasts, only that he was not to grab them. 49. In cross examination, X accepted that if the appellant had not bruised and grabbed her breasts, and if he had not pulled her hair and behaved the way he did, she would not have been in court. She reiterated on a number of occasions that he had "grabbed" her breasts . This is absolutely consistent throughout. As to X's instructions to the appellant on this issue, she went further in a long period of cross examination where X says this:- "He apologised and I said 'Well can you not touch my breasts again, I am in a lot of pain' and I thought, being the type of person that I am, thought well maybe I'm making a fuss about nothing, which I clearly wasn't, but that's, that's what went through my head, so I said that I was happy to continue having sexual intercourse as long as he didn't touch my breasts and then he grabbed them twice more. Defence: You may have asked him to be more gentle, but you didn't say to him 'Don't touch my breasts again'. Witness: I definitely did. Defence: [X], there you are, on top of this man, having intercourse with him, with your breasts pretty much in his face. It's inevitable, isn't it, in the throes of passion that he's going to touch your breasts. Witness: No, it's not. I remember clearly asking him not to grab at my breasts because I was in a lot of pain and so that's untrue..." 50. A little later there is this exchange:- "Defence: Mr Querée understood you to be saying 'be more gentle', not 'don't touch my breasts at all'. Witness: That's not true and then, even if I did ask him to be more gentle, which I did not, then why did he grab them so forcefully to cause me severe pain? I class that as an assault. Defence: You didn't ask him to be gentle then? Witness: I asked him to be more gentle in

general, that I was finding the sex rough and I asked him not to touch my breasts, that's correct. Defence: 'I again asked him to please be gentle with me as my breasts were really painful' that's what your statement says. Witness: OK, well I am pretty sure that I asked him not to grab at my breasts. Defence: But you did at one point say 'be gentle, be gentle with my breasts'? Witness: I did say 'be gentle with me', yes. I can't remember what I said word for word. I am sorry, it was a year ago." 51. The appellant denied in his evidence that X had mentioned her breasts at all when asking him to be more gentle. He had taken that to mean everything that he was doing and he said that he agreed and slowed things down. He said he tried to be more gentle. He said that at no stage did she tell him to stop, and in the light of the sexual activity that was happening between them, he had thought everything was alright between them. 52. Advocate Steenson submitted that in context, the evidence of X was not that she had told the appellant not to touch her breasts at all, but that she had told him not to grab at her breasts. We think on a review of the whole of her evidence, that that is a fair conclusion to reach, but we do not have to go so far. What we can say is that there is in our view no sufficient evidence that could have led the Magistrate to be sure that the instruction had been given to the appellant not to touch X's breasts at all. This is supported by the fact that X herself agreed in cross examination that she would not have been in court at all if the appellant had not bruised and grabbed her breasts; and by the fact that when she spoke to her mother at 7am that morning, she indicated that she did not know whether the appellant had intended to hurt her or not. It was clearly his intention which mattered, not what she thought his intention was; but, nonetheless, if immediately after the event even she did not know whether he had tried to hurt her, then the prosecution clearly would need some convincing evidence to establish criminal intent consistently with the Vaughan direction. 53. If, on a proper construction of X's evidence, the instruction to the appellant was not to grab at the breasts or more generally not to be rough or to be more gentle (all of which suggest something other than a requirement to stop touching the breasts) then the whole basis for the Magistrate's conclusion in relation to the appellant's intention falls. Accordingly on this ground too, we find that the Magistrate misdirected herself in a material way.

Conclusion

54. In all these circumstances we have unanimously reached the unequivocal conclusion that we cannot be comfortable with a finding of guilt on the charge of indecent assault and that therefore the conviction should be set aside. In so doing, we do not intend to be at all critical of X. The Magistrate may well have been correct in her conclusions that X had high hopes of the relationship with the appellant, that the appellant had been rough and that X had therefore been very disappointed by the sexual activity that had occurred between them. Different expectations between partners in sexual activity can be an issue. The bruising which X appears to have sustained would suggest that the appellant was at the very least insensitive to her in the course of that activity and to that extent it is unsurprising if X felt badly let down. Our point of departure from the Magistrate really comes with her conclusions that that difference in expectations must be regarded as having revealed the

necessary criminal intent on the part of the appellant and that there were circumstances of indecency. Both from the analysis which she gave and the evidence which she heard, we think the learned Magistrate on this occasion went wrong and accordingly the conviction is overturned. Authorities Sex Offender (Jersey) Law 2010. Syvret v Attorney General

[2009] JCA 181 . Police Procedures and Criminal Evidence (Jersey) Law 2003. Graham v Attorney General

[2013] (1) JLR 91. Rushton v Attorney General [Royal Court October 16th 1989 Unreported. Whelan's Aspects of Sentencing in the Superior Courts of Jersey, Second Ed. De la Haye v Attorney General

[2010] JLR 218 . Allen's Textbook on Criminal Law, 9th Edition. Brown (1993). Offences Against the Person Act 1861. Page Last Updated: 31 Jan 2018 BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bailii.org/je/cases/UR/2018/>

CASE PAGE <https://chat.esheria.ai/case-law/jersey/queree-v-ag-2018-jrc-014-18-january-2018>

Prepared on 23 October 2026 · Esheria