

JERSEY / JUDGMENT

The Attorney General v Michael John O'Brien

COURT

Royal Court

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Rape allegations; Bad character and sexual history applications**[2025]JRC182****Royal Court****(Samedi)****9 July 2025**

Before : Sir William Bailhache, Commissioner, sitting alone
The Attorney General
-v-
Michael John O'Brien
M. R. Maletroit, Crown Advocate.
Advocate J. Corbett K.C., for the Defendant.

JUDGMENT

THE COMMISSIONER: 1. The Defendant was charged on an indictment containing six counts alleging a variety of sexual offences against the Complainant, said to have been committed on 14 August 2023 at her premises at Property 1. The indictment charged the following offences: (i) Rape contrary to Article 5(1) of the Sexual Offences (Jersey) Law 2018 [the "2018 Law"]; (ii) Sexual penetration without consent contrary to Article 6(1) of the 2018 Law; (iii) Sexual touching without consent contrary to Article 7(1) of the 2018 Law; (iv) Causing a sexual act without consent contrary to Article 8(1) of the 2018 Law;

(v) Sexual touching without consent contrary to Article 7(1) of the 2018 Law, with a common assault as an alternative count; (vi) Voyeurism contrary to Article 36(3) of the 2018 Law. 2. Not guilty pleas were entered on the indictment. I heard an application by the defence on 2 April 2025 to admit bad character / sexual history evidence. At the conclusion of the hearing, I reserved judgment but indicated I would notify the decision to the parties through the Bailiff's Judicial Secretary the following morning, with detailed reasons to be given later. The decision was to refuse the applications, and this judgment now contains the reasons for

those decisions. It has been held back for publication to avoid any possible prejudice in the trial, although it will in addition be anonymised. 3. The Crown summary of facts set out the case against the Defendant in this way. Having met at a convenience store earlier in the evening by chance, there were exchanges on Facebook Messenger resulting in the Defendant asking the Complainant if she wanted to join forces. She agreed at 11.16 p.m. and the Defendant arrived at her flat at approximately 12.30 a.m. She had earlier bought a litre bottle of vodka and three cans of lager. The Defendant brought with him a smaller bottle of vodka and it appears that both were empty by the time the events of the day concluded. 4. The Complainant, who was on an amount of medication, and the Defendant shared both the vodka and some cannabis which the Defendant produced. The Crown case was that the Complainant told the Defendant that she had a blood clot in her ankle which he offered to massage to remove the clot. At his suggestion, they went from the living room into her bedroom. She lay on the bed, and he massaged her calf and ankle, but after a while moved his hand upwards towards her vagina. When she asked him what he was doing, he said that was part of the massage. He touched her vagina which she asked him not to do. 5. The Crown case then is that the Complainant fell asleep. She woke up periodically to find the Defendant having sex with her. She told him to get off and stop, in between falling in and out of consciousness. The Crown case was that she woke up approximately four times to him having sex with her. Later the Complainant recalled waking up on the sofa in the living room to find the Defendant urinating on her. Her pyjamas were soaking wet. She told him to leave the flat which he did. 6. Unknown to the Defendant, the Complainant had a hidden camera in her living room. She told the police that she originally thought it was not working. The camera was in fact operative and recorded parts of the incident, which filled in the gaps, according to the Crown, where the Complainant was unable to account for what happened due to her intoxication. It was said that the footage shows the Complainant becoming increasingly intoxicated over the course of the evening. At one point, seemingly asleep in her chair, the Complainant was approached by the Defendant. He grabbed her breasts. Subsequently he removed his penis from his trousers and commenced masturbation, taking her hand to put it on his penis causing her to masturbate him while she was unconscious. 7. The Defendant left the flat at about 5.09 a.m. The Complainant's partner visited her at approximately 9.10 a.m. He thought she had been drinking as she was slurring her words and noticed a bottle of vodka on the table. She told him she had had a "horrendous night" and eventually, becoming tearful and upset, disclosed she had been raped, naming the Defendant as the person who had raped her. Later that evening, P checked the hidden camera and found the footage. He showed it to the Complainant who had no recollection of much of what she saw, but as a result the police were called at approximately 11.03 p.m. the same day to report the incident. 8. The Defendant was arrested at 4.04 a.m. on 15 August at his home address and his mobile telephone was seized. Upon examination of the mobile phone, eleven images were recovered from a secure folder. These appeared to show the Complainant asleep or unconscious in her living room or bedroom in various states of undress, including images where her vagina was exposed. There are also images of the Complainant where her clothing is visibly wet and an image that shows her vagina being

penetrated by a finger or fingers. 9. It was these alleged facts which formed the basis of the six counts on the indictment.

10. The defence application was to introduce evidence of the bad character of the Complainant on the following grounds:
 - (a) As important explanatory evidence;
 - (b) As evidence which had substantive probative value in relation to a matter which was in issue in the proceedings and is of substantial importance in the context of the case as a whole; These applications were made pursuant to Article 82J of the Police Procedures and Criminal Evidence (Jersey) Law 2003 ("PPCE").
11. The evidence of bad character was alleged previous misconduct, namely reprehensible behaviour, evidenced by unidentified members of the States of Jersey Police who had completed various forms held at police headquarters with supporting material, all of which had been disclosed by the prosecution to the defence in the unused material. The specific events in question were set out in a chronology contained in a document headed "Police Research". The events were:
 - (a) 27 March 2020 - a report to the police that a female in a flat (who can only have the Complainant) was screaming that she was being raped. When police officers attended, the Complainant spoke of having her purse stolen and made no complaint of rape.
 - (b) 1 August 2020 - the Complainant called the police to attend her address and remove a male person. She claimed he had raped her and, on the arrival of police officers, gave a description of events. She went on to say that she did not believe she had been sexually assaulted in any way but also that she could not be sure. She said that she feared she might have been given a date rape drug (of which there was no evidence). No further police action was taken.
 - (c) 10 November 2020 - the Complainant told police that she suspected she had been raped by another person (and she described the event). He was charged but found not guilty after a trial on 26 June 2024.
 - (d) 24 February 2021 - the Complainant claimed that a male person had assaulted her by taking hold of her neck [sic] and applying pressure (of which on examination there was no physical sign). During the investigation she sent the male a text reading "You are going to prison. You raped me". When she was asked about this by the police, she claimed that a third party had sent the message while she was asleep. She declined to make a statement. No further police action was taken.

- (e) 29 November 2022 - the Complainant reported that she fell asleep at a male person's house and woke up with no clothes on. She claimed to have no recollection of what had occurred but said she had had no intention of having sex with him. She did not say that to the attending officers. Forensic enquiries were negative and there was no corroborative evidence. No further police action was taken.
 - (f) 13 July 2023 - The Complainant woke up in the morning with no trousers on. She claimed that a male person who was present had removed her trousers so he could engage in sexual contact with her and because he wanted to have sex. She later claimed that she had no memory of this (but that the male person had told her). Her account was different from telephone and CCTV evidence. No further police action was taken.
 - (g) 14 August 2023 - The offences under the indictment alleged against the Defendant.
 - (h) 30 September 2024 [sic 2023] - the Complainant's partner, reported to the police that the Complainant had been raped by a male person. There was CCTV footage taken in the Complainant's flat that apparently showed her being raped. She appeared to be unconscious at the time. The male was charged with rape and sexual touching and pleaded guilty.
12. It was said by the Defendant that evidence of these matters is admissible as important explanatory evidence pursuant to Article 82J(1)(a) of PPCE. This was so because the primary defence was one of consent, and it was inevitable that the jury would ask itself why the Complainant should say that she did not consent. On the other hand, if the jury were aware that she has a history of misconduct by making claims of rape which have either resulted in no police action or in the event of 10 November 2020 a verdict of not guilty, the jury will be more likely to consider that making claims of rape is what she does and this will explain her claim not to have consented to sexual activity with the Defendant. (I pause there to indicate that when it actually came to trial, the Defendant departed from his defence case statement to say that in relation to the count of rape, there was never any penetration at all, and he did not have intercourse with the Complainant. Recognising that his defence at trial on that charge was not just the overall consent to sexual activity but rather the absence of penetration, nonetheless, the decision I reached in April was on the basis that the primary defence was that of consent.)
13. As to the question of whether the evidence would have substantial probative value and indeed be of substantial importance for the purposes of Article 82J(1)(a) and (b), it was said that the opportunity to cross-examine on the identified events in the chronology would be likely to have substantive probative value in relation to a live issue in the proceedings, namely that of consent and was therefore important in the context of the case as a whole. In particular, it was emphasised that the Defendant was not referring to one event but several. In other words, the misconduct alleged was not an isolated incident. Secondly, it was said that the incidents all took place in a relatively short time period and spanned the indicted offences. Finally, it was said that there was a common theme to the incidents and there are clear similarities between them.

14. I noted that the defence case statement, which apart from generally putting the Crown to proof, asserted that (i) the Complainant consented to whatever sexual activity there was, and (ii) the Complainant had a predisposition to making false complaints of rape.
15. In oral argument, Advocate Corbett suggested that as regards reprehensible behaviour, one might accept that on one previous occasion, or possibly two, of a complaint to the police result in no further action might be acceptable but there comes a point when it is no coincidence. He submitted that it was not for the defence to show that on the previous occasions the complaints were false. Ultimately that would be for the jury to decide. The hearsay application which was linked to the bad character application would operate in this way - the chronology of police entries would be a document which would be put to the Complainant in cross-examination and used as hearsay evidence of its truth. Essentially the argument was that the multiplicity of complaints was sufficient evidence from which the jury could infer falsity.
16. Opposing the application, Crown Advocate Maletroit submitted that there were two key aspects - the permission to cross-examine the Complainant on whether previous things said by her were true, and secondly the permission to put materials to her. He accepted that the creditworthiness of the Complainant would be a key question at trial. By contrast, on hearing the present application, the issue for the Court was whether the material in question was of substantive probative value. In his submission, the evidence was relevant to her creditworthiness but was not of substantive probative value.
17. Advocate Maletroit submitted that each instant must be rigorously scrutinised. On the details of each particular incident, he then submitted that there was nothing specific to show that the Complainant had made false claims in the past, and one could not infer falsity from the numbers of instants which has been recorded. It would be entirely speculative. Cumulatively, nought plus nought plus nought still equalled nought.
18. It was also submitted that the Complainant was a vulnerable adult who had a propensity to be in risk situations by virtue of her alcohol intake. This, coupled with the drugs prescribed for her, made her feel drowsy and particularly vulnerable. It was unsurprising she did not remember all that had happened. The CCTV did provide some corroboration for offences in the living room albeit not, at least directly, for the offences alleged to have taken place in the bedroom.
19. In reply, Advocate Corbett submitted that there was no corroborative evidence to support her credibility. He agreed that the consideration of each individual incident should be rigorous, but he submitted it was for the jury to decide what is made out and what was not. A pattern emerged and I should take the view therefore that these were not incidents which merited a cumulative zero. Discussion

20. The legal principles for determining this type of application were considered in AG v Lloyd [2023] JRC 144 at paragraphs 7 to 20 and I do not seek to repeat those paragraphs now, but adopt the principles set out there.
21. I recognise the argument that there comes a time when the accumulation of complaints made on previous occasions which have either resulted in verdicts of not guilty if pursued, or in no further action being taken by the police or the prosecution authorities may, by their very number, raise questions which require to be addressed. Nonetheless, as said by the Deputy Bailiff in Lloyd, there are two hurdles for the defence to surmount - first the defendant must show that a reasonable inference can be drawn from the evidence that the previous complaint was false. Secondly, it needs to be shown that the evidence has substantial probative value in relation to a matter which is in issue in the proceedings and that the matter is of substantial importance in the context of the case as a whole.
22. The arguments which are advanced by the Defendant in this case satisfy me that the evidence could be relevant in relation to a matter which is in issue in the proceedings (the alleged consent of the Complainant) and that matter is of course of substantial importance in the context of the case as a whole. That second hurdle is comfortably passed.
23. The question is whether or not there is a reasonable inference to be drawn from the evidence that one or more previous complaints was false because it is that which would establish relevance to the present case. On that issue, I have regard to the sixth edition by Rook and Ward of "Evidence that the complainant has made complaints", section 26.194 onwards. In particular at 26.201, the authors, having considered the English Court of Appeal decision in R v A M [2009] EWCA Crim 618 say this: "It remains important that allegations of previous false complaint should be rigorously scrutinised. There must be material that, at the very least, is capable of founding an inference that the previous complaint was false. In its absence, a suggestion that the complaint was false is merely a matter of speculation. An acquittal of the alleged offender in respect of a previous complaint does not, by itself, make that complaint false. All it shows is that the prosecution did not satisfy the criminal burden of proof. Similarly the fact that an earlier complaint has not been prosecuted does not provide a proper basis for asserting that it was false, even if the police decided that there was insufficient evidence to prosecute. The views of the CPS or the police are simply expressions of opinion and are irrelevant to the issue. Inconsistencies in a complainant's account in respect of an earlier complaint may be due to the trauma of the sexual assault. The fact that there is evidence of more than one unpursued allegation does not necessarily provide the appropriate evidential foundation. In Salaam David All-Hilly ([2014] EWCA Crim 1614) the Court of Appeal rejected the appellant's contention that the circumstances revealed an inherent unlikelihood of unpursued allegations of sexual abuse against a number of men being true. Treacy LJ stated: "The Court should be ready to deploy a degree of understanding of those who have made sexual allegations. Failure to pursue the complaint does not of necessity show that it is untrue. A rather close examination of the circumstances is required." The Court then examined the individual matters separately and

concluded that none of them began to provide a basis for an inference or conclusion of a false complaint. In those circumstances, there was no advantage to the appellant in seeking to rely on an accumulation of negative results. The fact that there was no instance which began to show falsity could not be converted into evidence of falsity by the fact that complaints had been raised more than once."

24. This approach has been adopted on a number of occasions in the Courts of this island. In particular, I remind myself of the public interest, referred to by Sir Michael Birt, Commissioner, at paragraph 41 of AG v Correia [2015] JRC 061A as being "summarised conveniently by Lord Hutton at para 142 in R v A namely to ensure that the woman who complains that she has been raped is treated with dignity in Court and is given protection against cross-examination and evidence which invades her privacy unnecessarily and which subjects her to humiliating questioning and accusations which are irrelevant to the charge against the defendant".
25. It is important to note the use of the word "unnecessarily" in that summary. It may well be necessary to put questions to a complainant which are humiliating and accusations of previous false complaints if they are relevant to the charge (as in my judgment they would be relevant to the issue of consent in the present case if there is anything in them) but it is essential that the threshold for putting such questions is passed by the rigorous examination which the authors of Rook and Ward suggest.
26. I turn therefore to the specific incidents referred to by the Defendant in his application.
Incident 17-27 March 2020
27. In this case the Complainant did not make a complaint to the police. The police responded to a call from a member of the public who reported hearing a female scream that she had been raped. As the Complainant did not make that complaint, it is impossible to say that the incident supports the assertion that she makes false complaints of rape. The incident cannot possibly assist the jury in determining where the truth lies in the instant case, and accordingly it has no probative value. Incident 1 August 2020
28. This incident referred to a call by the Complainant to the police during which she requested they remove a male from her address. It was one of a number of domestic incidents involving her and the male. The police log records the Complainant as having said she had been raped when she made the telephone call. However, when spoken to by the attending officers, she said that she did not think sexual intercourse had taken place. In fact, she said that she "didn't feel like she had recently had sex. On further discussion, [she] confirmed she was not drunk and did not feel anything happening, she did not believe [the male] had sexually assaulted her in any way at that point but said she couldn't be sure. She did not wish to discuss this any further with police or proceed with any police investigation, she merely wanted [the male] out of her flat".

29. Thus it is clear that she made no complaint of rape or sexual assault. There is no basis upon which one can assert that the account she provided to the police was false and the incident thus has no probative value. Incident 10 November 2020
30. On this occasion the Complainant did make an allegation of sexual misconduct which was investigated, the suspect was charged and prosecuted for one count of sexual penetration without consent, and he was acquitted on a trial before a jury. The acquittal plainly does not establish that the Complainant's account was untrue. All it establishes is that the prosecution had not discharged the burden of proof. If I were to permit evidence of the not guilty verdict to come before the jury, it would invite a trial within a trial as to whether the decision of the jury in that case could only properly be construed as a decision that she had made a false complaint. Such a process is so far away from the proper management of a criminal trial that it is unthinkable that a Court should pursue it. The right course is to accept that the verdict only shows the Crown had not discharged its burden of proof, and in the absence of any other clear evidence - such as, for example, an admission in evidence by the Complainant on that case that she had fabricated the complaint - it can go no further. Incident 24 February 2021
31. The police log here related to a domestic incident between the Complainant and her partner. They had had a disagreement and she wanted him to leave her address. In the domestic violence risk assessment, the Complainant disclosed to officers that her partner had recently taken hold of her around the neck and put pressure on the sides of her neck and thrown her on the bed. However, she did not wish to provide any further detail, make a complaint or support a police investigation. When interviewed, her partner denied assaulting her. He stated that he had received a text from the Complainant's number accusing him of rape. When asked about this the Complainant explained that a third party had sent that message from her phone while she was asleep and there is no evidence to contradict her account. Furthermore she made no complaint to the police on this occasion and there is therefore no basis to assert that the account she provided to the police was false. Incident 29 November 2022
32. On this occasion the police were contacted by the Complainant's partner. The Complainant was very intoxicated and difficult to understand but it was established that she had been to another man's address where she woke up with her jeans and knickers removed. She did not know what had happened. She told the police that she did not remember anything, and she did not tell the attending officers that she had been raped or sexually assaulted. In interview, the suspect admitted kissing the Complainant and some sexual touching but he denied intercourse. Forensic enquiries were inconclusive as to whether or not sexual intercourse took place. No further action was taken because there was insufficient evidence to recommend a charge, an unsurprising outcome given that the Complainant stated she could not remember what had happened. Incident 13 June 2023

33. On this occasion, the Complainant reportedly made a disclosure to staff at a pharmacy that she thought she may have been raped. Police were called. It was established that a male had been at her address the previous evening. She had become intoxicated and could not remember what happened. The male had reportedly told her that he removed her trousers while she was unconscious and played with her clitoris and breasts in an attempt to arouse her.
34. Upon his arrest, the suspect stated that he had a kiss and cuddle with the Complainant. He admitted they had some sexual contact including him rubbing her genitals over her clothing but he stated that she then passed out and would not wake up. The forensic analysis casted some doubt on his account but ultimately it was decided there was insufficient evidence to provide a realistic prospect of conviction the main issue being consent - i.e. proof that the Complainant was incapable of consenting due to her intoxication or otherwise did not consent at the material time, and no further action was taken. The Crown contended that the mere fact that the suspect was not charged but does not provide an evidential basis to assert that the Complainant's account was false, and I agree with that analysis. However it goes further than that. Just as in the previous illustration, in order to establish the position, there would have to be a form of satellite litigation as to whether she had been raped and why the man was not prosecuted. Her evidence could clearly be no better now than it was then. It will not be demonstrably false even if she repeats that she thought she may have been raped. Incident 30 September 2023
35. On this occasion, the Complainant was raped and sexually assaulted. This incident post-dates the offences in the present case.
36. She did make a complaint and a prosecution was launched. Ultimately that defendant pleaded guilty and was sentenced by the Superior Number of the Royal Court on 9 April 2024. The incident plainly cannot be used by the Defendant to support an assertion that the Complainant makes a false complaint of rape. It was not false. In fact she did not make any allegations giving rise to the prosecution, given that she had no recollection of the incident, but the decision to prosecute was taken because there was video footage showing the offence took place.
37. I accept that the credibility of the Complainant is in issue as far as consent is concerned. In my judgment, what is put forward as to the various incidents do not cross the threshold which would enable a question to be put to her on the basis that she makes false complaints. The events show that she has in all but three occasions not actually made a complaint of rape to the police. Furthermore, of the three occasions where she did make such a complaint, one resulted in an acquittal; one resulted in a plea of guilty; and the third is the present case. Importantly, there is no evidence of any of the claims which she made being false.

38. For these reasons, I concluded that the defence had not shown that a reasonable inference could be drawn from the evidence that previous complaints were false and accordingly I refused the application to introduce evidence of the Complainant's sexual history and cross-examine her about alleged previous false complaints. Authorities Sexual Offences (Jersey) Law 2018. Police Procedures and Criminal Evidence (Jersey) Law 2003. AG v Lloyd [2023] JRC 144. Rook and Ward on Sexual Offences. R v A M [2009] EWCA Crim 618. AG v Correia [2015] JRC 061A.

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