

JERSEY / JUDGMENT

Warn v AG [2022] JCA 131 (20 June 2022)

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Court of Appeal 20 June 2022 Before : George Bompas Q. C., President; Lord Anderson of Ipswich K. B. E., Q. C. ; and Sir Wyn Williams Jamie Lee Warn -v- The Attorney General The Appellant appeared in person. Advocate M. Preston appeared as Amicus Curiae. S. C. Thomas Esq. and M. R. Maletroit Esq., Crown Advocates appeared for the Respondent

JUDGMENT

WILLIAMS JA: This is the judgment of the Court.

Introduction

1. The Appellant, Jamie Lee Warn, is aged 58. On 3 December 2021, following a trial at the Royal Court, (Commissioner Birt and a jury) he was convicted of the murder of Zsuzanna Besenyei , a woman aged 37. On 21 March 2022 the Appellant was sentenced to life imprisonment; the Royal Court specified that the minimum term which the Appellant must serve before being eligible for release on parole should be 17 years less the 1394 days which the Appellant had spent on remand in custody. 2. The trial presided over by the Commissioner was the third time that the Appellant had been tried upon the charge that he had murdered Ms Besenyei . At two previous trials he had been convicted by the jury but following appeals to the Court of Appeal his conviction had been quashed. The judgments of the Court of Appeal following each appeal were not published pending the conclusion of re-trials which the Court directed. Given the conclusion we have reached upon this appeal, there is no reason, now, to withhold publication of the previous appeal judgments and in the Act of Court which gives effect to our conclusion on this appeal we direct that the previous appeal judgments of this Court should be made public. They can be found under the headings and citations, respectively, Warn v The Attorney General

[2019] JCA 144 and Warn v The Attorney General

- [2021] JCA 337. 3. In most important respects the evidence adduced by the Crown at each of the three trials was virtually identical. The Crown relied very substantially upon circumstantial evidence in order to prove its case. It was common ground between the Crown and the Defence at each trial that there was no direct evidence which proved how, when, where or why Ms Besenyei lost her life. The case for the Crown was that there was a very powerful circumstantial case which proved the charge of murder beyond any

reasonable doubt and that this case was supported by lies told by the Appellant in the statements to which we refer in the next paragraph. 4. At each of his trials (including the trial before Commissioner Birt) the Appellant elected not to give evidence and no witnesses were called on his behalf. In the course of the police investigation which preceded his arrest the Appellant provided two formal witness statements made in accordance with the requirements of Article 9 of the Criminal Justice (Evidence and Procedure) (Jersey) Law 1998 which statements were adduced as part of the Crown's case. Following his arrest, the Appellant was interviewed by police officers under caution on 5 separate occasions but, as is his right under the law of Jersey, he answered all the material questions put to him by saying "no comment". 5. At each of his trials the Appellant was represented by Advocate James Bell. At the trial before Commissioner Birt, Advocate Bell cross-examined many of the witnesses called to give oral evidence and he made a closing speech to the jury. During the course of his cross-examination Advocate Bell laid the ground for the arguments which were to feature in his closing speech. In that speech detailed submissions were presented to the Jury as to why the circumstantial evidence adduced on behalf of the Crown was not capable of proving beyond reasonable doubt that Ms Besenyei had been killed. Alternatively, Advocate Bell argued that the jury could not be satisfied that it was the Appellant who had killed the Deceased (assuming her killing was proved) or that at the time of the killing he had the requisite intent for murder. Advocate Bell had deployed the same means of seeking to undermine the case presented by the Crown at the previous trials. 6. By a Notice of Appeal dated 22 December 2021, the Appellant gave notice of his desire to pursue an appeal against his conviction. As we understand it, whereas Advocate Bell had represented the Appellant at each of his two previous appeals to this Court, he had no involvement in the preparation of the Notice of Appeal or the detailed grounds of appeal which accompanied it. The Appellant himself prepared those documents. On 10 January 2022 Advocate Michael Preston was appointed as an *amicus curiae*. He did not file written contentions of his own concerning the Appellant's proposed appeal. However, he did assist the Appellant to present some refinements to his grounds of appeal which were produced to the Court on 5 May 2022. 7. As was to be expected, the Respondent instructed trial counsel, Crown Advocates Thomas and Maletroit, to act on his behalf and they filed written contentions opposing the appeal on 6 May 2022. 8. At the hearing on 23 May 2022 the Appellant represented himself. It would have been difficult, if not impossible, for Advocate Bell to have represented him on appeal since the grounds of appeal contained express and implied criticisms of the Advocate's conduct prior to trial and at the trial itself. In any event, the Appellant had sought to obtain legal aid to pursue his appeal but this had been refused following an advice from counsel that there were insufficient prospects of a successful appeal to justify the grant of legal aid. At the hearing Advocate Preston was present to assist the Court in his role as *amicus curiae*. However, we did not think it necessary to call upon him for assistance by making oral submissions on any of the issues raised by the Appellant and he did not, of his own volition, think it necessary to add to the Appellant's oral submissions or written contentions. Crown Advocate Thomas provided oral submissions in response to

certain of the Appellant's oral submissions at the invitation of the Court; otherwise, he relied on the written contentions which had been filed on 6 May 2022. 9. A convicted person can appeal against conviction to the Court of Appeal as of right in reliance upon any ground of appeal which involves a question of law alone; otherwise, an appeal against conviction can be brought only with the leave of this Court or upon the certificate of the trial judge that the case is fit for appeal - see section 24(1) of the Court of Appeal (Jersey) Law . There is no certificate from the Commissioner in this case. In our judgment none of the grounds of appeal relied upon by the Appellant can be categorised as grounds involving a point of law alone. Prior to the hearing before us on 23 May 2022, there had been no determination of the threshold issue of the grant or refusal of leave to appeal against conviction. Nevertheless, so as to avoid unnecessary delay and procedural argument, we heard full submissions from the Appellant upon all those grounds of appeal which he decided to articulate orally. 10. On an appeal against conviction the Court of Appeal shall allow the appeal if it considers that the verdict should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence; it shall also allow the appeal if it concludes the judgment of the court before which the appellant is convicted should be set aside on the ground of a wrong decision upon any question of law. In any event the Court must allow an appeal if it considers that there has been a "miscarriage of justice" - see section 26(1) of the 1961 Act. 11. The Appellant's written grounds of appeal are very detailed. They are set out under 12 headings. In our judgment, there is significant overlapping between a number of the grounds. As drafted, they do not specify which limb of section 26(1) is relied upon. We make no criticism of the Appellant for that since, as we have said, he acts in person. As it seems to us, the grounds, taken as a whole, seek to rely upon all the provisions of section 26(1) i.e. the Appellant argues that the verdict of guilty was unreasonable and was not supported by the evidence, that a judgment of the Commissioner (identified at paragraphs 94 and following below) was wrong as a matter of law and that the Appellant was the victim of a miscarriage of justice. 12. We do not propose to analyse the Appellant's grounds of appeal under the headings and in the order in which the Appellant presented them in writing and orally. That would involve a considerable amount of unnecessary repetition. Instead, we will assess the Appellant's grounds by reference to section 26(1) of the 1961 Act by determining (a) whether the verdict was unreasonable or (b) unsupported by the evidence; (c) whether a judgment of the court should be set aside on the ground that it was erroneous in law and (d) whether the Appellant suffered from a miscarriage of justice. Before making that assessment, however, it is necessary for us to set out relevant facts which were agreed at trial and, further, explain the way in which the Crown put its case at trial. Agreed Factual Background 13. The Appellant and Ms Besenyei first met when they were both employed at Les Charrieres Hotel, Jersey in the period 2011 to 2014. Both left their employment at the hotel in 2014 but they remained in contact. 14. By May 2018 Ms Besenyei was residing in rented accommodation in St. Martin. Her landlord was Mr. Trevor Lucas to whom she paid rent weekly. She was employed at Computershare Jersey Limited at its offices in Hillgrove Street, St Helier. During the week commencing Monday 7 May 2018 Ms Besenyei was on

annual leave and she was due to return to work on 14 May. Ms Besenyei also performed part time work as a domestic cleaner. She provided cleaning services at the home of Mr and Mrs Brooke under an arrangement whereby she would clean their home on a weekly basis each Saturday morning. 15. From 2011 until shortly before her death, Ms Besenyei had been involved in a relationship with Mr Cliff Nobrega . They had lived together for a number of months from around December 2017 until February 2018. However, by the beginning of May 2018 it appears that their relationship had come to an end, although Mr Nobrega wanted it to continue. 16. At the material time (May 2018) the Appellant lived with his son in a flat at 80 Pomme d'Or Farm, West Hill, St Helier. For some years the Appellant had been in a relationship with Ms Michelle Cooper, who lived close to his flat. On Tuesday 8 May, he began working for a construction company known as Mitchell Building Solutions Limited as a labourer. He attended his place of work throughout the period 8 May to 11 May. 17. Both the Appellant and Ms Besenyei held driving licences. Ms Besenyei owned a blue Ford Fiesta motor car registration number J48188; the Appellant did not have a motor car. 18. Telephone records obtained from Jersey Telecom show that text messages were sent to and from the mobile phones owned by Ms Besenyei and the Appellant between Saturday 5 May and Sunday 13 May. Messages exchanged between 8 and 10 May appear to show that Ms Bezenyei was expecting to receive money from the Appellant and that she was becoming annoyed about the time it was taking the Appellant to obtain the money. During this same period there were also text messages between Ms Besenyei's phone and the mobile phone of Mr. Nebrega in which Mr Nebrega was attempting to persuade Ms Besenyei to resume their relationship. 19. On 8 May, at around 2:37 pm, Ms Besenyei was captured on CCTV footage at the shop known as Sports Direct. She appeared fit and well. She bought a yoga mat and a pair of trainers. At around 10:45 am on 9 May, she attended a personal training session, which included a boxing session at Fort Regent Leisure Centre, St Helier. According to her trainer, Ms Besenyei appeared normal and healthy. During the course of the afternoon there was telephone contact between the phones of the Appellant and Ms Bezenyei in which they appeared to be arranging for her to visit him that evening. 20. At around 3:00 pm on 10 May, Ms Besenyei visited a local hair salon and made a hairdressing appointment for 11:00 am the following day. At approximately 5:00pm that afternoon Ms Besenyei's landlord, Mr Lucas, saw her smoking a cigarette outside the kitchen of their shared premises. The telephone records show that at 5:06pm a telephone call was made from the Appellant's mobile phone to Ms Bezenyei's phone. At 5:49 pm, a text message sent to Ms Besenyei from the Appellant's telephone stated: " Park in mine at the back honey cos I think next door will still be at work xxx" . 21. At around 6:00 pm, Ms Besenyei left her home in St Martin to travel to the Appellant's address at Pomme d'Or Farm. She was driving her blue Ford Fiesta motor car. Various items of CCTV footage show the car travelling to the vicinity of the Appellant's flat where it arrived at around 6:26 pm. 22. At 7:30 pm an email was sent to Mr Nobrega from Ms Besenyei's phone in which it was made clear to him that their relationship was at an end. At 8:20pm, a man was captured on CCTV entering the Checkers Express store situated near the Appellant's flat. That man bought a bottle of hand sanitiser and cigarettes. The till

receipt later obtained from the store showed a discount attributable to a loyalty card that had been issued to Michelle Cooper's mother, who was formerly employed at the store. When he left the premises, the man who had purchased the items was captured on CCTV footage using the hand sanitiser and walking in the direction of the Appellant's flat. 23. The internet history obtained from the Appellant's mobile telephone shows that it was used to make an internet search for " parking paycards " at 6:55am on 11 May. At 7:00am, a man was shown by CCTV going into the Checkers store near the Appellant's flat. That man bought a day's worth of parking paycards . 24. Ms Besenyei did not attend her hairdressing appointment arranged for 11:00am on 11 May and she also failed to attend an appointment with her beautician which had been arranged for 2:30pm. She did not pay her weekly rent to Mr Lucas either on 11 May (when it was due) or subsequently. Attempts to contact her during the course of the day were unsuccessful. 25. The Appellant finished work in the early afternoon of 11 May and was given a lift by a colleague into St Helier, where he arrived at around 3:30pm. He withdrew £110 in cash from the branch of HSBC in Halkett Street. As the Appellant was walking to the bank his telephone was used to carry out two internet browser searches. The first at 3:45pm: " Jersey weather forecast ". The second at 3:46 pm: " tide times ". 26. CCTV footage shows that at around 6:00pm the Appellant and his partner, Michelle Cooper, made their way to the Earl Grey public house where they stayed until around 10:00pm. During the course of the evening between 8:00pm and 10:00pm the Appellant's telephone was used to make three internet browser searches: (i) " how to turn off location services iphone " (Ms Besenyei's mobile telephone was an iPhone); (ii) " poo spray for toilet "; (iii) " poo spray for women " (at the post-mortem the pathologist noted that Ms Besenyei had defecated and there were faeces around her anus). That evening, Mr Nobrega attempted unsuccessfully to contact Ms Besenyei by telephone. 27. Ms Besenyei failed to turn up to her regular Saturday morning cleaning job at the home of Mr and Mrs Brooke on 12 May. Later that day at just after 7:00pm, Mr Brooke tried to contact Ms Besenyei but failed to do so. During the afternoon of 12 May the Appellant was with his girlfriend Ms Cooper in the Earl Grey public house. 28. On Sunday 13 May Mr. Brooke again attempted to call Ms Besenyei . His call went unanswered. Ms Besenyei's landlord, Mr Lucas, sent her a text message chasing the rent which should have been paid on Friday. Mr Lucas received a response from Ms Besenyei's telephone: "Sorry bout that will sort it out when get home haven't been feeling to well sorry again." Mr Lucas said that he had no knowledge of Ms Besenyei being unwell either then or at any other time. 29. At 1:47pm on 13 May, a text message was sent from the Appellant's mobile telephone to Ms Besenyei's mobile telephone stating: " thinking of popping round I'll text ya later when I know xxx" . Further messages were exchanged between the two mobile telephones during the course of the afternoon which appeared to make reference to Ms Besenyei's former partner, Mr Nobrega , and also to the loan of money. The first of this sequence of messages was sent from Ms Besenyei's telephone to the Appellant at 2:42pm and this was followed by two messages from the Appellant's telephone to Ms Besenyei's , the first at 2:43pm followed by another at 2:47pm. 30. At 3:41pm, CCTV footage shows a man shopping alone in the Checkers store. He bought some frozen food and obtained a discount using the loyalty

card that had been issued to Michelle Cooper's mother. At around the same time there was an exchange of text messages between the Appellant's telephone and Ms Besenyei's . At around 7:00pm, Ms Besenyei's mobile telephone exited the telecommunications network i.e. it was switched off. It has remained inactive since that time and its whereabouts are unknown. 31. Ms Besenyei did not attend work on Monday 14 May. At around 11:46am, a lifeguard contacted the States of Jersey Police to report that there was a vehicle on the beach in the area of La Haule which had been submerged in the sea. Police officers located the vehicle at around 12:15pm. The vehicle in question was the Ford Fiesta car belonging to Ms Besenyei and it was stationary facing out to sea. The front doors were closed with the front windows fully open. The rear doors were closed with the rear windows two-thirds open. The driver's seat was pushed back as far as it would go notwithstanding that Ms Besenyei was only 5'3" tall. The car was removed from the beach and taken to a secure location where it was left to dry out before it was the subject of forensic examination. When efforts to locate Ms Besenyei's whereabouts were unsuccessful, a missing person inquiry was launched. 32. At 12:23pm, Ms Besenyei's line manager, who had been given the Appellant's telephone number as a point of contact, called the Appellant to say that Ms Besenyei had not attended for work. The Appellant said that he would try to contact her. At 12:25pm, the Appellant sent a text to Ms Besenyei saying that he had been contacted by her employer. 33. Just after 5:00pm, the Appellant was contacted via WhatsApp by Magdalena Grigoras , a friend of Ms Besenyei informing him that she had seen the news on States of Jersey Police Facebook page that Ms Besenyei was missing. The Appellant replied at 6:28pm. Ms Grigoras responded almost immediately with two further messages. The Appellant replied by telling Ms Grigoras that he was going to contact the Police. 34. At 6:37pm, the Appellant called the Police on 999. He said that he was one of Ms Besenyei's best friends and that they had been in contact over the weekend. He also said that he thought she had been with her boyfriend because her texts had suggested that she was going to sort things out with him. The Appellant was told that an officer would contact him. A few minutes later, at 6:46pm, the Appellant was called by a police officer and during the course of this conversation the Appellant said that he had received a message from Ms Besenyei the previous day. He went into some detail about her relationship problems with Mr Nobrega and said that he had last seen Ms Besenyei on Wednesday 9 May when she had attended his flat. He said that at that time she had been depressed as a result of her treatment at the hands of Mr Nobrega . Following this call the Appellant sent two text messages to Ms Besenyei's telephone asking her to call him. He said that he was worried. He also continued to communicate with Ms Grigoras . 35. At 7:30pm, police officers visited the Appellant's home address. He was not at home. A neighbour directed the officers to the Earl Grey public house where the Appellant was spending the evening with Michelle Cooper. When asked about Ms Besenyei's disappearance, the Appellant said that he had last seen her when she had visited his flat to collect some money on Thursday 1 May 2018 (a change from what he had said previously, see paragraph 34 above). He volunteered details about Ms Besenyei's relationship with Mr Nobrega . The officers noted that the Appellant had an injury to his nose. When asked about the injury, the Appellant

said that while sleeping on the sofa in his flat he had fallen off and collided with a coffee table. 36. On the evening of 15 May, the Appellant was contacted by the investigating police officers and asked to provide a statement dealing Ms Besenyei's last known movements. He provided a statement which contained details of the relationship between Ms Besenyei and Mr Nobrega , which he described as " volatile ", and also referred to his own contact with Ms Besenyei between Sunday 6 and Sunday 13 May. He said that she had visited his flat on the evening of Thursday 10 May to collect £150 in cash. The Appellant also referred to text messages received from Ms Besenyei on Saturday 12 and Sunday 13 May. He described his own relationship with Ms Besenyei as being that of a good friend. He denied that their relationship had been sexual although he said that Ms Besenyei had, on occasions, sent him photographs in which she was naked. 37. At around 4:45pm on 16 May, Ms Besenyei's body was discovered by a member of the public walking on Le Pulec beach (known on the Island as "Stinky Bay"). The fully clothed body was between 50 and 100 metres from the end of Le Pulec Slipway, lying in approximately 1 or 2 feet of water and seaweed. Members of the Fire and Rescue Service attended the scene and recovered the body. Ms Besenyei was formally pronounced dead at 5:27pm. 38. On 23 May, the Appellant agreed to provide the investigating police officers with a witness statement concerning his movements between 10 and 14 May 2018. The Appellant provided further details of Ms Besenyei's visit to his flat on Thursday 10 May. He said that she had been at the flat for about half an hour and that there was no sexual contact between them. They had discussed her relationship with Mr Nobrega and " had a general chit chat ". He told the police that he had assumed that Ms Besenyei had driven her car to the flat but he had not seen it. According to the Appellant he went to Michelle Cooper's house after Ms Besenyei had left and spent the night there. The Appellant made further reference to the messages he received from Ms Besenyei on Saturday 12 and Sunday 13 May 2018, and claimed that on the Sunday evening he had stayed at his flat where he fell asleep on the sofa. In this statement the Appellant divulged that his relationship with Ms Besenyei had been sexual. 39. The Appellant was arrested on suspicion of murder at his home address on Friday 25 May 2018. When cautioned he made no reply. He was taken to Police Headquarters and detained. As we have said he was interviewed under caution on five occasions on 25 and 26 May 2018 and answered " no comment " to all material questions put to him. On the same day, a forensic examination was conducted at the Appellant's address. There was no physical evidence of Ms Besenyei's presence in the Appellant's flat, nor was there any evidence of the premises having been cleaned. Police officers also seized a rucksack containing a pair of black rubber gloves and a bottle of hand sanitiser. 40. The Ford Fiesta motor car was examined after a lengthy period in which it was allowed to dry out. No physical evidence was found to suggest that Ms Besenyei's body had been in the boot of the car; nor was there any evidence that the boot had been cleaned. 41. A post-mortem was carried out by Dr Russell Delaney, a Home Office Pathologist, at Jersey General Hospital on Friday 18 May. He arranged for Ms Besenyei's larynx and brain to be examined by other medical experts, respectively Professor Mangham and Dr. Euranka . Dr Delaney's conclusions, in summary, were that it was not possible to determine (a) the date of Ms

Besenyey's death (although it was likely that it had occurred some days before the discovery of the body), (b) the mechanism which had resulted in death or (c) the medical cause of death. He acknowledged that his assessment was complicated by the degree of decomposition of the body and the effects of changes caused by the period the body had spent in water and also by the position of the body after death. There appeared to be external and internal injuries to the neck including a fracture of the right superior horn of the larynx, but these injuries were not easily attributable to any mechanism resulting in death. 42. The larynx was examined by Professor Mangham, an expert specialising in bone and soft tissue pathology. He identified a non-displaced fracture of the superior horn of the thyroid cartilage which could have been caused by a forceful compression. However, his view was that this injury probably occurred at least a day before Ms Besenyey's death and very likely in the period one to four days before her death. No abnormality to the brain was found during the course of the examination conducted by Dr Euranka . 43. Ms Besenyey's body was also examined by a pathologist, Dr Shepherd, who was instructed on behalf of the Defence. This fact was not elicited before the jury but, as will appear, the Appellant attaches some significance to the fact that the report produced by Dr Shepherd was neither shown to him (as he maintains) throughout the trial proceedings nor deployed in his trial. 44. In accordance with Articles 83 to 85 of the Criminal Procedure (Jersey) Law 2018 and Rule 2 of the Criminal Procedure (Statements and Evidence) (Jersey Rules 2019) the Appellant provided a Defence Case Statement prior to his trial. In that statement he denied killing Ms Besenyey . The course of the trial before the Royal Court 45. Prior to the commencement of the trial on 23 November 2021, the Commissioner explained to all prospective jurors that there had been two previous trials and two appeals and he made appropriate inquiries about whether any prospective juror should not sit as a juror on account of the publicity which had surrounded these trials and appeals. He informed the Jury, once selected, that in order to ensure the fairness of the new trial the jury were required faithfully to follow his directions, act fairly and decide the case strictly in accordance with the evidence. He provided a number of directions to the jury as to how they should or should not conduct themselves during the course of the trial, all of which were delivered in conventional form. He went on to explain the legal ingredients of the offence of murder as follows: "Murder is committed where a person of sound mind and discretion unlawfully kills another person with intent to kill or with intent to cause serious bodily injury to them. Now, I had no indication from the Defence in the weeks before the trial that there is any suggestion that the Defendant is not of sound mind and discretion and, unless there is evidence that he is not, the law makes an assumption that he is. So, the question for you in this case is going to be whether you are sure that the Defendant did in fact kill Ms Besenyey unlawfully, and that when doing so he had the intent to kill her or to cause her serious bodily injury." It is not suggested that this explanation of the offence of murder is flawed in any way. 46. The Indictment alleged that the Appellant had killed Ms Besenyey " on or before 16 May 2018 ". However, Crown Advocate Thomas made it clear to the jury during the course of his opening speech that the case for the Crown was that the Appellant had killed Ms Besenyey at some point in time

between 7.30pm and 8.20pm on Thursday 10 May 2018. 47. As we have said, the Crown adduced no direct evidence as to how or when Ms Besenyei had met her death. The evidence adduced by the Crown was, very substantially, circumstantial evidence although reliance was also placed upon alleged lies told by the Appellant in the witness statements to which we have referred at paragraphs 4, 36 and 38 above. The Crown's case was presented on the basis of evidence derived from a variety of sources, which included a good deal of expert evidence. In summary, in support of its case the Crown relied on the following matters which it was argued were established beyond reasonable doubt by the evidence. (i) The Appellant's sexual relationship with Ms Besenyei which carried on during his relationship with Michelle Cooper and was kept secret from her. (ii) In the days leading up to Ms Besenyei's death, she sent text messages expressing her disappointment and anger that the Appellant was failing to provide her with money which she was expecting from him. (iii) Ms Besenyei was in good health. She had undergone a session of vigorous exercise with her personal trainer on Wednesday 9 May. Dr Delaney found no evidence of death by natural causes and there was no evidence of any kind which suggested that suicide was a possibility. (iv) Ms Besenyei travelled to the Appellant's flat in her Fiesta motor car during the early evening of Thursday 10 May, as evidenced by text messages, CCTV evidence, cell-site data and the Appellant's witness statements. She was never seen again alive. (v) The last reliable indication that Ms Besenyei was alive was at 7:30 pm on Thursday 10 May when she sent an email to Mr Nobrega. (vi) At around 8:20 pm on Thursday 10 May 2018, a man was captured on the CCTV footage as he walked towards Checkers where he bought hand sanitiser. He appeared calm and collected. The corresponding till receipt showed a discount attributable to a loyalty card that had been issued to Michelle Cooper's mother. The jury could safely conclude that the man in question was the Appellant. (vii) The telephone cell-site data relating to the Ms Besenyei's mobile phone was consistent with it being in the vicinity of the Appellant's address from the evening of Thursday 10 May until Saturday 12 May 2018. (viii) The Appellant was in control of Ms Besenyei's car from 11 May 2018 until it was abandoned. This was proved by CCTV footage and the purchase of the parking paycards. Further, the purchase of the parking paycards demonstrated that the Appellant was calculating and had the foresight to decide what to do with the car while he was at work. (ix) The telephone cell-site data and CCTV footage demonstrated that the Appellant was in possession of Ms Besenyei's telephone from the evening of 10 May to the time when it was switched off on 13 May. The telephone has never been found. (x) The Appellant's plan to conceal and then dispose of the body which was evidenced by his various internet searches ("Poo spray for women", "Tide Times", "How to turn off location service iphone"). (xi) The Appellant's involvement in the disposal of Ms Besenyei's body in the early hours of Monday 14 May, which was evidenced by the CCTV footage and telephone cell-site data. The Crown alleged that by the early hours of the morning the Appellant had put Ms Besenyei's body into her Ford Fiesta motor car. He had then driven first to Stinky Bay to dispose of the body and then to La Haule to abandon her car on the beach. At 3.03 that morning CCTV near Checkers showed a man walking along Paris Lane. The Crown maintained that this was the Appellant who

had walked from La Haule to his flat. (xii) The Appellant's attempts to give the false impression that Ms Besenyei was alive as late as Sunday 13 May 2018 and the abandonment of her car which was intended to give the false impression that she may have taken her own life. (xiii) The Appellant's attempt to mislead the investigating police officers by providing two witness statements which were false in material particulars. 48. As we have said, the case for the Defence was a denial of any involvement in the killing and an assertion that the circumstantial evidence was incapable of proving the offence of murder. In cross-examination, Advocate Bell challenged the evidence adduced by the Crown when appropriate in order to advance that case. Further, Mr Nobrega, who gave evidence as a prosecution witness, was cross-examined about Ms Besenyei's use of online dating sites (seeking to raise the possibility of relationships with other men) and the volatile nature of their own relationship (although it was not suggested in terms that Mr Nobrega had played any part in Ms Besenyei's disappearance). 49. At the close of the Crown's case Advocate Bell made a submission of no case to answer. We shall return to the submissions made by Advocate Bell and the ruling given upon those submissions by the Commissioner at paragraphs 94 and following below. At this stage, it suffices to say that the submission of no case failed. 50. Immediately after the Commissioner ruled that the Appellant had a case to answer, Advocate Bell informed the Court that the Appellant would not be giving evidence himself and that he would not be calling any evidence. The sequence of events was then as follows. First, the Commissioner provided counsel with a draft of some of the proposed legal directions which he proposed to give to the Jury. Counsel were given time to scrutinise and, if appropriate, comment upon the draft. As it happened no new or amended directions were suggested by counsel. Second, the Commissioner provided the Jury with a written note of those legal directions together with a further document known as a "Route to Verdict". In so doing, the Commissioner was acting entirely conventionally. Third, Crown Advocate Thomas and Advocate Bell delivered their closing speeches. Finally, the Commissioner provided his complete summing-up which encompassed all necessary legal directions and a review of the evidence. All the Commissioner's legal directions were reduced to writing and provided to the jury in written form. Additionally, they were read out to the Jury. He again made explicit reference to the document entitled "Route to Verdict". It should be noted that the Commissioner directed the jury that three possible verdicts were open to them, namely guilty of murder, not guilty of murder but guilty of manslaughter, and not guilty. 51. After the jury had been in retirement for 5 hours and 45 minutes the Commissioner gave a majority verdict direction. It will be necessary to consider the terms of that direction in due course. After a further retirement the jury returned a majority verdict of guilty of murder. Discussion The verdict was unreasonable 52. In this section of our judgment, we consider the grounds of appeal which the Appellant has advanced under the headings "Murder set aside as no murder has taken place", "Beyond reasonable doubt", Post mortems and release of body" and "Directions on Manslaughter Alternative". 53. The Appellant submits that the verdict of guilty of murder was unreasonable. In support of this contention, he reminds the court that each element of the offence of murder must be

proved before a person can be convicted of murder. That is, in any given case, the Crown must prove beyond reasonable doubt that the accused has unlawfully killed his alleged victim and that at the time of the killing the accused intended either to kill the victim or cause her really serious bodily injury. The Appellant argues that there was no evidence before the jury from which they could be sure that Ms Besenyei had been killed unlawfully and, in particular, there was no reliable evidence which proved that she had been killed during the time period 7.30pm and 8.20pm on Thursday 10 May 2018 as the Crown alleged. Alternatively, and/or additionally, he maintains that if her killing was proved there was no evidence from which the jury could be sure that it was he who had killed her. Finally, if he was proved to have been the person who killed Ms Besenyei there was no evidence from which the jury could be sure that he had killed her and at the time of the killing he had intended to kill her or cause her really serious injury. 54. In support of these contentions, he points to the following. First, no medical cause of death could be established by Dr Delaney, the pathologist called by the Crown, notwithstanding his own investigations and those of other specialist medical witnesses. The medical evidence did not rule out death through natural causes and/or suicide. Second, Ms Besenyei's body was cremated before Dr Delaney and Dr Shepherd had completed their investigations as to her cause of death with the consequence that ascertaining the cause of her death became impossible. Third, there was no physical evidence which linked him to Ms Besenyei's death. Fourth, there was no direct evidence, such as eye witness evidence, linking the Appellant to her death. Fifth, and very importantly, the circumstantial evidence relied upon by the Crown together with the Appellant's lies in his witness statement did not necessarily prove the Appellant's guilt on the charge of murder. The Appellant stresses that the Commissioner directed the jury that they should be careful to distinguish between arriving at conclusions based upon reliable circumstantial evidence and "mere speculation". He maintains that there must have been a good deal of unwarranted speculation on the part of the Jury about the manner of Ms Besenyei's death which improperly influenced the Jury to return their verdict of guilty of murder. Further, as we explain below in the next section of our judgment, the Appellant makes a number of submissions about a number of strands of the circumstantial case against him which he claims were flawed and which, accordingly, were not reliable. He suggests, too, that the circumstantial case taken at its highest did not prove his guilt on the charge of murder; rather, to repeat, it invited a good deal of speculation on the part of the Jury which was impermissible. Sixth, there was no evidence, circumstantial or of any other kind, which began to prove that the requisite intent for murder was established. 55. In their written contentions filed on behalf of the Respondent, Crown Advocates Thomas and Maletroit make a number of proper concessions. They acknowledge that there was no evidence before the jury as to the medical cause of death and that if the medical evidence was taken in isolation the possibility that Ms Besenyei's death had been occasioned by natural causes, accident or suicide could not be ruled out. They acknowledge, too, that the medical evidence alone could not establish when the death Ms Besenyei had occurred. They concede that Ms Besenyei's body was cremated before the pathologists had concluded their investigations

as to cause of death. However, they point out that the body parts which were subject to specialist examination and investigation were preserved and they point out, too, that it was not suggested to the Jury during the course of the trial that the cremation of Ms Besenyei's body had hampered the investigation into her death in any way. The thrust of the points made on behalf the Respondent as to the reasonableness of the verdict and the Appellant's contentions thereupon can be summarised thus:

- (a) the jury were properly directed upon the ingredients of the offence of murder; (b) it was not incumbent on the Crown to prove a precise cause of death or when, on or before 16 May 2018, Ms Besenyei was killed; (c), rather, it was sufficient for the Crown to prove that she had been unlawfully killed by the Appellant and that at the time the killing the Appellant had intended to kill or cause really serious bodily injury;
- (d) the circumstantial evidence in this case, supported by the Appellant's lies, was sufficient to make the Jury sure that the Appellant had killed Ms Besenyei on Thursday 10 May 2018 between 7.30 and 8.20 pm; and (e) the circumstantial evidence was sufficient to prove that the Appellant had the relevant intent at the time of the killing. 56. We accept the submissions made on behalf of the Respondent. In our judgment the Jury were entitled, on the whole of the evidence presented to them, to find that Ms Besenyei had been killed unlawfully; that the perpetrator had been the Appellant; and at the time of the killing he had intended to kill her or cause her really serious bodily harm. Our reasons for reaching these conclusions are as follows. 57. First, the absence of a medical cause of death is not a bar to a finding that a person has been killed. Upon a charge of murder there is no requirement upon the Crown to prove the precise cause of death of the victim; rather the Crown is required to prove that the victim has been killed. If that was not so, there could be no conviction for murder where the perpetrator of the crime has hidden the body of the deceased successfully thereby preventing an investigation of the medical cause of death. The Appellant acknowledged the force of this point during the course of his oral submissions. 58. Second, a killing may be proved by evidence which is wholly or substantially circumstantial. The law of Jersey does not require that a killing must be proved by direct evidence as the Appellant seemed to suggest when pressed on this point. 59. Third, upon the whole of the evidence adduced in this case, the jury was entitled to rule out the possibility that Ms Besenyei had died of natural causes, had committed suicide or had died accidentally. In his summing up, the Commissioner was careful to direct the jury that they must consider these possibilities and reject them before they could conclude that Ms Besenyei had been killed - see transcript of the summing-up (Day 9) at pages 44 and 45. We can safely conclude that the Jury followed this direction given the strength of the circumstantial evidence available to the Crown. 60. Fourth, the Jury was entitled to conclude that the Appellant had told lies to the Police in the two witness statements which he made, respectively, on 15 May and 23 May. In his summing-up the lies relied upon by the Crown were identified for the Jury by the Commissioner as being (a) that Ms Besenyei had contacted the Appellant by text on 12 and 13 May (this assertion was made in both statements) (b) there was no sexual relationship between the Appellant and Ms Besenyei

(first statement) (c) that the Appellant was at his girlfriend's house at about 8.20pm on 10 May whereas, in fact, he was at Checkers (second statement)

- (d) that the Appellant was in his flat for the whole of the evening of Sunday 13 May whereas, in fact, he was driving Ms Besenyei's motor car (second statement): see transcript of the summing-up (Day 9) at page 10. Those lies, once proved, were capable of supporting the Crown's case that Ms Besenyei had been killed. 61. Fifth, the lies identified above were also capable of supporting the Crown's case that it was the Appellant who had killed Ms Besenyei. As to that, however, and quite independently of the lies, there was very powerful evidence pointing to the conclusion that the Appellant had killed her. On his own admission, the Appellant was with Ms Besenyei on Thursday 10 May 2018 during the early evening for a period of time of about half an hour. She was never seen alive after that. The Jury was entitled to conclude on the whole of the cell-site and CCTV evidence that the Appellant had Ms Besenyei's mobile phone in his possession until it was switched off and, that being so, it was he who successfully disposed of it. The Jury was also entitled to conclude on the basis of the whole of the cell-site evidence, the whole of the CCTV evidence and the evidence of the eye-witness Ms Johnson that the Appellant was in control of Ms Besenyei's motor car from the evening of 10 May until it was left at La Haule in the early hours of the morning of 14 May and that he was the person who was driving it that morning. In our judgment, this evidence, as a whole, was undoubtedly capable of proving that it was the Appellant who killed Ms Besenyei. 62. Sixth, no evidence was adduced before the jury which suggested that the killing had been lawful. For example, there was no suggestion that this was a killing in self-defence. In our judgment the Commissioner was correct to direct the jury that they could rule out the possibility that the killing, if proved, was lawful - see transcript of the summing-up (Day 9) at page 12. The Appellant makes no criticism of this direction in his written or oral contentions. 63. Finally, we are satisfied that there was reliable evidence before the jury to justify their conclusion that the Appellant had intended to kill Ms Besenyei or cause her really serious bodily injury. In a criminal trial, and in the absence of a confession, a person's intent at the time he committed a crime can only be judged by the relevant surrounding circumstances i.e. by circumstantial evidence. Juries are routinely directed to that effect in Jersey (as in England and Wales) in all cases in which an intention to commit a particular crime is an ingredient of the offence. In this case, the Commissioner, as part of his written legal directions (which were repeated orally), told the jury that they must be sure that the Appellant had intended to kill Ms Besenyei or cause her really serious injury before they could convict him of murder - see transcript of the summing-up (Day 9) at pages 11 to 13. When summarising the case for the Crown towards the end of his summing-up he set out those parts of the circumstantial evidence upon which the Crown relied as proving the intent for murder - see pages 46 to 47 of the transcript of the summing-up (Day 9). In our judgment, once the jury had been satisfied so that they were sure that the Appellant had unlawfully killed Ms Besenyei, the evidence of how he behaved from Thursday 10 May to Monday 14 May provided very powerful evidence to justify the conclusion that the intent for murder was proved. The elaborate nature of the cover-up, the

disposing of the body and the steps which must have been taken to avoid an evidential trail leading to the Appellant were wholly consistent with the Appellant having intended to kill Ms Besenyei or, at least, cause her really serious bodily harm. 64. In the light of these conclusions no useful purpose would be served by an extensive analysis of the Appellant's complaints about the direction given to the jury about the alternative offence of manslaughter. However, we observe: (a) the verdict of not guilty of murder but guilty of manslaughter was correctly left to the jury; it was inevitable that the alternative verdict would be left to the jury following the Appellant's successful appeal against his murder conviction after his second trial - see *Warn v Attorney General* [2021] JCA 337; (b) the directions provided to the jury as to the legal ingredients of manslaughter were accurate and correct - see transcript of the summing-up (Day 9) at page 12; and (c) the jury were told, correctly, that this alternative offence should be considered only if they were sure that the Appellant had killed Ms Besenyei unlawfully but they could not be sure that he had the intent for murder at the time of the killing. The Appellant's real complaint is not that the legal ingredients of the offence of manslaughter were not correctly explained by the Commissioner but rather that the elements of the offence could not be proved. Since we have concluded that a conviction for murder was justified on the evidence before the jury, this point becomes academic and of no consequence. 65. We are satisfied that that the verdict of guilty of murder is not unreasonable and this potential ground of appeal is rejected. The verdict was not supported by the evidence. 66. In this section of our judgment, we consider the grounds of appeal identified by the Appellant under the headings "Prosecution Use of Pre-Existing Injury", "Secret love affair", "Body in boot of car", "Use of the word Defendant" and "Having her phone in my possession". We also consider an aspect of the CCTV evidence which was dealt with at some length orally by the Appellant. 67. The Appellant argues that the Crown should not have been permitted to rely upon the evidence of Professor Mangham. The Professor was called to describe how his examination had confirmed that Ms Besenyei had suffered a small non-displaced fracture of the superior horn of the thyroid cartilage which was typically caused by the person suffering the fracture being gripped around the neck. The Appellant's principal basis for now objecting to the evidence given by Professor Mangham is that such evidence improperly influenced the jury towards thinking that Ms Besenyei had been killed by strangulation. That possibility was made the more likely, argues the Appellant, because, the Professor gave an illustration of how such an injury might be caused when he gave his evidence by gripping his own neck. 68. No objection was made to this evidence being adduced at trial. Most probably that was because the evidence of Professor Mangham was to the effect that this fracture could not, of itself, have caused Ms Besenyei's death and, further, that the injury had been caused to Ms Besenyei between one and four days prior to her death. In those circumstances his evidence gave rise to a fruitful line of argument that a person other than the Appellant (a) caused this injury and, therefore, (b) may have subsequently caused her death. In his closing speech to the jury Advocate Bell referred to the evidence of the Professor not just in relation to the timing of the injury but also to demonstrate the possibility that the injury may have been inflicted by someone other than the Appellant. 69. The absence of an objection to the

evidence of Professor Mangham at trial does not mean that the Appellant is precluded from arguing on appeal that the evidence should have been excluded. However, given the use made of the evidence on behalf of the Appellant at trial it is very difficult to see any substance in the Appellant's complaint. As the Respondent maintains, it was made crystal clear during the course of Professor Mangham's evidence that injury to the superior horn was not the cause of death; that it had occurred at least one day before death with it occurring most likely within a range of between one and four days before death; and that there was the possibility, at least, that it had been inflicted by someone other than the Appellant. 70. In his written contentions the Appellant took issue with the Crown's assertion that he was having a secret love affair with the deceased, which he characterised as an attempt by the Crown to shock and stir up emotion in the jury. This ground of appeal was not developed in the hearing before us, not surprisingly given that in his witness statement of 15 May 2018, the Appellant had asserted that there was nothing sexual about the relationship whereas in his second witness statement, given eight days later, he changed his story, accepting that he and the deceased had habitually " been sexual with one another " (though he claimed that full intercourse was not involved), and that the deceased had sent him intimate photographs. Text messages between the Appellant and the deceased in the weeks before her death were clearly affectionate and flirtatious. In the circumstances, there was ample evidence to justify the Crown's case to the effect that the Appellant and Ms Besenyei were in a sexual relationship which he kept secret from his girlfriend Ms Cooper. 71. The Appellant also complains that the Prosecution produced no evidence to support its case that he kept the body of the deceased in the boot of her car. He described this allegation as " a horrifying thought " which could have prejudiced the Jury. 72. In the written contentions on behalf of the Respondent the evidential basis for this part of the Crown's case was described. The following points were made. First, the jury could be satisfied that it was the Appellant who drove the deceased's car into the First Tower car park just before 7am on Friday 11 May, the morning after the prosecution says she was killed. The car was parked on the lower level where it remained until the evening of Sunday 13 May. Second, CCTV footage showed the Appellant acting suspiciously around the vehicle, in particular on the evening of Sunday 13 May when he looked briefly into the boot before walking swiftly out of the car park when a member of the public appeared and then returning once the member of the public had left. Third, the Appellant drove the car out of the car park in the early hours of Monday 14 May. He was not carrying anything other than his rucksack when he approached the car. The cell-site and CCTV evidence relating to his journey to Le Pulec suggested that he drove there directly. The jury was entitled to infer that the deceased's body was in the boot at that stage. Fourth, the evidence of Dr Delaney in terms of patches of blood drainage was that the deceased had been in contact with a hard surface after she died and had been in two positions. Fifth, the evidence of the forensic entomologist, Dr Martin Hall, was that there was an absence of blow flies on the deceased's body. He would usually expect to see signs of blow flies within 24 hours of death, particularly when the weather was good. The arrival of blow flies would take longer if the body was in an enclosed space, such as a car boot, and if that enclosed space was in a cooler area, as the underground part of the car park would have

been. 73. As additional support for its case, the Crown pointed out that if Ms Besenyei had been killed in the time window that it suggested and her body disposed of in the early hours of 14 May, the body would have had to be stored somewhere within the Appellant's control during the intervening period, and that space was very limited inside the Appellant's one-bedroom flat, which he shared with his son at the time. 74. We have no doubt that the Crown was entitled to put its case on this issue in the way that it did and that a proper evidential basis existed for the Crown's contention. The Defence was entitled to challenge the evidence relied upon, and took that opportunity both in cross-examination and in Advocate Bell's closing speech. 75. Ultimately, however, the Crown did not have to prove where the body of Ms Besenyei had been between the time of her death and her discovery at Stinky Bay. We are quite satisfied that regardless of whether the Jury was satisfied beyond reasonable doubt that Ms Besenyei's body was stored in the boot of her car, they were entitled on the basis of all the evidence in the case to reach the verdict that she was murdered by the Appellant. 76. We next deal with the point raised by the Appellant, under the heading " Use of the word defendant ", to the effect that the Crown may have prejudiced the jury by repeatedly identifying him as the figure seen on CCTV images, particularly in the vicinity of the First Tower car park. He refers in particular to the Appellant's initials appearing at the start of CCTV clips, and to repeated identifications being made during the Prosecution's opening speech. 77. There is no substance in this point. Having reviewed the transcript of the trial we consider that both the Commissioner and the Crown were careful to emphasise that the question of whether the Appellant was shown in CCTV images was for the Jury to decide. Before Crown Advocate Thomas made his opening speech the Commissioner directed the jury that they would be asked to view CCTV films which showed images of a person and that part of their function would be to compare such images with the Appellant in order to determine whether the image was that of the Appellant. They were told in terms that unless they were sure that an image was that of the Appellant it was irrelevant to their verdict. Further, after reviewing a transcript of the opening speech of Advocate Thomas we do not think that the Jury could have been under the misunderstanding that identification was anything other than an issue for them. When introducing the CCTV evidence (transcript (Day 1) page 27), Crown Advocate Thomas informed the Jury that they would be looking at a large amount of CCTV footage which " the Prosecution says plainly shows the Defendant ... ", and similar formulations were used on numerous occasions when commenting on specific images. In inviting the Jury to conclude that the figure in the CCTV pictures was the Appellant, the Crown relied not only on the appearance of the figure but on supporting evidence such as the route being walked, his distinctive rucksack and clothing, his bank details (supporting the identification of a man seen in HSBC as the Appellant) and his acquaintance with an eye-witness to whom he waved in the car park. 78. In the unlikely event that the Jury had been in any doubt as to its own responsibility for the identification issue, such doubt would have been allayed by the Commissioner's summing-up. He emphasised that identification was a matter for the Jury, warned about the dangers of mistaken identification, and specifically directed the Jury to take care when comparing CCTV images with their view of the Appellant in the dock. Having told them that they could

watch the CCTV footage as many times as they wished when they retired, the Commissioner urged caution because "the standard and burden of proof is such that you must be sure it is the Defendant before you can take that evidence into account"

- see transcript of the summing-up (Day
- 9) pages 7-9. 79. In his oral submissions the Appellant concentrated on an apparent timing discrepancy between two of the CCTV stills from 10 May that had been placed before the Jury. One such image, timed at 20.25.59, showed a person leaving the Checkers First Tower shop. A second image, timed at 20.25.58, showed a person walking into the First Tower car park. The almost identical timing was said to disprove the Crown's case that the two figures could have been the same person. 80. Crown Advocate Thomas described this as "a fair and powerful point", and acknowledged that it could not simply be explained by inconsistencies between the time clocks on different CCTV cameras, given that the timings provided to the Jury were supposed to have been corrected to allow for such inconsistencies (although he also pointed out that, as DC Foord accepted in her evidence, there had been at least one typographical error in that process, relating to a different image). 81. The discrepancy was fairly drawn to the Jury's attention by Advocate Bell in his closing speech. Given that, together with the abundant other evidence, including of the Defendant's movements on the evening of 10 May, and the unimpeachable guidance given to the Jury on identification evidence, we are satisfied that this issue falls well short of founding the conclusion that the Jury's verdict cannot be supported having regard to the evidence. The evidential point raised was one for the jury to evaluate against the evidence as a whole and they were given proper opportunity to undertake the evaluation. 82. We turn finally in this section of our judgment to the that part of the Appellant's written contentions (developed further orally) which seek to persuade us that the Crown was unable to prove that the Appellant had in his possession both his own mobile phone and that of Ms Besenyei during the period 12 May and the evening of 13 May when Ms Benenyei's phone was switched off. 83. In Jersey, the operators of mobile phones retain the records of phone and mast connections for 10 days. As a result of the way in which the investigation into Ms Besenyei's death progressed, those records for her phone (referred to in this section of our judgment as phone 9544) were obtained as from Thursday 10 May 2018, while those for the phone of the Appellant (referred to as phone 0214) were obtained as from very early in the morning of Saturday 12 May 2018. 84. At trial, the Crown adduced expert evidence from Mr Andrew Carpenter who, in 2018, had been employed by the States of Jersey Police as a cell site analyst and mobile phone network surveyor. Mr Carpenter gave oral evidence and was cross-examined upon the location and movements of phones 9544 and 0214 in the period we have identified at paragraph 82 above. With the consent of the Appellant, the Jury was provided with a Bundle of Documents which included an Island wide map of cell-site locations, a number of cell site maps with annotations of times of connections and CCTV location and a document entitled Telecommunications Schedule which contained information about the usage of the phones 9544 and 0214 and another mobile phone belonging to Mr Nobrega. 85. In his evidence, Mr Carpenter explained that a mobile phone is designed to connect with the mobile phone mast

with a cell which at any time is providing the strongest signal. Such a connection is made only when there is a "data event"; that is, when a signal transmits or receives between a cell on the mast and phone. The fact that a phone makes a connection with a particular mast only confirms that at that moment the phone is within an area of coverage of the mast. For example, in the present case the Appellant's flat at Pomme D'or Farm was within the area of primary coverage of east-oriented cells on the ESM mast at Electrical Supplies & Machinery, First Tower. 86. According to Mr Carpenter, phone 9544 was making connections with the ESM mast consistently and almost without making any connections with any other mast from the evening of Thursday 10 May until the morning of Saturday 12 May, and then again from later in the morning of that day until about the time the phone was switched off during the evening of 13 May. But that fact alone did not establish that the phone was to be found at Pomme D'or Farm while connected with the ESM mast; all that Mr Carpenter could say was that throughout that time the phone was somewhere within a wide area of coverage from that mast. 87. There are three other general points worth making. (i) First, both phone 9544 and 0214 could connect with 2G, 3G or 4G cells. In the case of connection with 2G or 3G cells, the telephone company records provide the precise time of the data-event which caused the connection. In the case of 4G cells the records only show connection "windows" or "sessions", that is period of minutes or hours during which there may be one or more data-events but without the time of data-event or events being capable of being precisely determined. In many cases the same mast has both 3G and 4G cells. The ESM mast is such a mast. (ii) Second, the Jury was provided with a Telecommunication Schedule setting out a log, with dates and times, of information extracted from the two mobile phones along with the records or their connections with various masts. This schedule showed occasions when both phone 9544 and phone 0214 connected to the same mast at about the same time. It also showed occasions when one made a connection to a mast with which the other did not make any connection. It demonstrated, too, that phone 9544 had a greater propensity to connect with 4G cells than phone 0214. The Jury also had a map of the various relevant masts on the Island, and further more specific maps annotated with maps noting masts and places where CCTV cameras had captured what were said to be relevant images, along with timings. (iii) Third, there may be reasons for a phone to connect variously with different masts, switching from one mast to another, or from one set of cells on a mast to another, which have nothing to do with any movement of the phone from one place to another. The switch may be caused by cell usage at the mast, so that the available signal strength changes, or because a vehicle comes between the mast and phone. By way of example, the Bellozane mast, which lies to the north of the Appellant's home at Pomme D'or Farm and has cells oriented north-west, can provide coverage not only to the north but also to the south: Mr. Carpenter explained that it has a lobe of rear coverage which includes Pomme D'or Farm. On occasions on 13 May 2018 both phones switched at about the same time from connecting with the ESM mast to communication through the Bellozane mast. Later they switched back. But this does not necessarily imply that the phones both moved at the same time from one area of coverage to another, only that this was a possibility. 88. A part of the Crown's case against the Appellant was that on the morning of Saturday 12 May 2018, after he had killed Ms Besenyi, he

walked from his flat into the centre of St. Helier to shop for cleaning materials at a store in Halkett Street and then walked home again. The Crown also sought to prove that during this journey he had both phones with him and used phone 9544 to send himself a text message to which he replied not long after from phone 0214. This journey the Crown sought to establish from a combination of (a) CCTV images from along the route said to have been taken and within the shop, and (b) data taken from the phones along with the records concerning phone and mast usage. 89. Before us, the Appellant attempted to show that the mobile telephone mapping exercise undertaken by the Crown, in reliance upon Mr Carpenter's evidence, demonstrated that on the morning of 12 May 2018 he could not have had both his phone and Ms Besenyei's with him when (if he did) he made the journey to and from the centre of St Helier. The basis for this submission is that while the Telecommunication Schedule showed phone 0214 making connections with various masts consistent with a journey into the centre of St Helier to and from Pomme d'Or Farm over the space of a couple of hours on the morning of 12 May 2018, and although the same was true of phone 9544, there were occasions during that same period when the phones did not make connections with the same masts. In particular there was no connection made by phone 0214 with the Kensington mast, a mast to the west of the Central mast and south-east of the ESM mast, while at some point phone 9544 made a 4G connection with the Kensington mast. 90. The difficulty for the Appellant, in our judgment, is that Mr Carpenter gave oral evidence in which he confirmed that the Telecommunications Schedule, which was shown to him in his examination in chief, supported the case that the two phones had moved together on the morning of 12 May 2018 from the area of primary coverage of the ESM mast to a small area within the coverage of the Central mast (which area included the Halkett Street shop) and back again to the area of primary coverage of the ESM mast. Further, and very importantly, this movement coincided with the movement of a person pictured on CCTV images and said to be the Appellant. Support for this was that one of the images captured on CCTV showed the person said to be the Appellant using a mobile phone at precisely the same time as phone 9544 transmitted a text message to the Appellant. 91. Contrary to the Appellant's submission, it is not clear that the Telecommunications Schedule casts any doubt on the evidence of Mr Carpenter we have described above; and he was not challenged on this evidence. The short point is that there is no evidence that each of the two phones would necessarily, or even probably, always connect to the same cells at the same time and in the same way, having data events at the same time, if held together in the same place. On the other hand, the evidence was that they might. Indeed, they apparently did so on the ESM mast at 09.38 on 12 May, on the Central mast (that is the mast with the small area of coverage in the centre of St Helier) at 10.10 on the same day and again on the ESM mast at 11.17 on the same day. 92. It seems to us that the very powerful evidence, from the mapping exercise combining the CCTV images with the information in the Telecommunications Schedule, that phones 9544 and 0214 were in the custody of the same person on the morning of 12 May 2018 could not be undermined simply by virtue of there being one occasion within that period when one phone connected with a mast which the other did not connect with, or of their being other occasions when the second phone made connections with masts with

which the first did not make any connections. 93. Accordingly, we reject the Appellant's contention that it was impossible for him to have carried with him on the morning of 12 May 2012 both his own mobile phone and that of Ms Besenyei when, as the Crown alleged and by inference the Jury must have accepted, he made a journey from his flat to Halkett St and back again. The Commissioner's judgment on the submission of no case to answer. 94. We can deal with this issue quite shortly. At the conclusion of the case for the Crown, Advocate Bell submitted that there was "no case to answer in respect of murder". 95. We should make it clear that Advocate Bell explicitly conceded that there was sufficient evidence upon which a properly directed Jury could conclude that they were sure that the Appellant had killed Ms Besenyei. That is clear from the transcript of the argument presented by Advocate Bell - see transcript of his submissions (Day 7) at pages 13 to 15. He made no submission at all which suggested that the killing might have been lawful (see the same pages of the transcript). The submission of no case was based solely upon the contention that there was no evidence upon which a properly directed Jury could be sure that the Appellant had the requisite intent for murder. 96. In his reply to Advocate Bell, Crown Advocate Thomas resisted the suggestion that the intent for murder could not be proved, relying upon the circumstantial evidence which we have summarised at paragraphs 55 and following, above. 97. In his judgment upon the rival contentions of the Advocates, the Commissioner cited the well-known decision of the Court of Appeal (Criminal Division) of England Wales in *Galbraith*

[1981] 1WLR 1039 and also a passage from the text book *Blackstone's Criminal Practice 2021* upon the approach to be adopted to a submission of no case to answer when the evidence relied upon by the Crown is wholly or substantially circumstantial in character. He then continued:- "Advocate Bell accepted that it would be open to a jury, properly directed, to accept the Crown's case that the circumstantial evidence of what the Defendant is said to have done after the alleged time of death on Thursday evening showed that the Defendant committed the actus reus of killing Ms Besenyei. However, as I say, he had submitted that, in the absence of any evidence as to how and when she died, no reasonable jury (properly directed) could find the necessary intent to kill or cause really serious bodily harm. I do not accept that submission. In my judgment for the reasons given by Advocate Thomas, the actions of the Defendant from Thursday evening onwards could lead a properly directed jury to be sure not only that the Defendant killed Ms Besenyei, but also at the time he must have had the necessary intent for murder." 98. In our judgment the approach of the Commissioner to the application of no case was correct. He made no decision which was wrong in law. Quite the contrary, he correctly applied the law as set out in *Galbraith* and *Blackstone's Criminal Practice* to the evidence adduced by that stage and his conclusion is unimpeachable. Accordingly, there is no basis for concluding that his judgment should be set aside. Was there a miscarriage of justice? 99. As is obvious from the above, we are completely satisfied that the Appellant cannot establish that he suffered from a miscarriage of justice on the basis of the grounds of appeal so far considered. What remains, therefore, is our consideration of a number of issues raised by the Appellant under the following headings in his written grounds namely, "Doubt raised over judge's

behaviour" , "Prosecution pressurizing putting pressure on judge Regarding half time submissions" and "judge pressurized the jury" . We also consider in this section the Appellant's complaints against Advocate Bell's conduct of his defence and his reliance upon what he claims occurred at his sentencing hearing. 100. Under the heading Doubt raised over judge's behaviour the Appellant identified what we categorise as alleged procedural errors on the part of the Commissioner. They are conveniently summarised in the written contentions on behalf of the Respondent as follows. First, it is said that the Commissioner failed to give appropriate directions to four witnesses whose evidence was not completed before the trial was adjourned for appropriate breaks. The witnesses identified by the Appellant are Mr Nobrega , DC McGee, DC Foord and Dr Delaney. Second, DC Foord gave evidence on two occasions during the course of the trial. The Appellant points out that after completing her evidence on the first occasion the Commissioner indicated to her that she was free to go. When she returned to the witness box to give evidence for a second time, she was told by the Commissioner that she was still under oath but she was not re-sworn. Third, on at least one occasion the Commissioner began speaking to the Advocates before the Appellant was brought into court. Fourth, the Appellant alleges that the judge left the courtroom at the conclusion of the trial while the Jury were still in court thereby displaying that he was in a rush to get the trial concluded. 101. This last point is, quite frankly, ridiculous. The trial had ended. Whether the judge leaves court before or after the jury is a matter entirely for the judge and cannot conceivably have any relevance to his conduct of the trial. As to the other issues raised, none of the alleged errors now relied upon by the Appellant were the subject of any investigation, comment or complaint at the trial itself. When asked by the court to demonstrate any prejudice which had been occasioned to him on account of the failures he identified, the Appellant properly conceded that no prejudice had arisen. We are prepared to accept that a witness whose evidence is interrupted by an adjournment is, conventionally, warned not to speak about his or her evidence during the adjournment. However, the failure to warn a witness in those terms must be demonstrated to have adverse consequences for an accused before it can raise a proper ground of appeal. That is not this case. We also accept that some judges would have directed that DC Foord be re-sworn when she was called to give evidence for a second time. However, the Commissioner told her that she was still under oath and there is no reason to suppose that his failure (if failure it was) to insist that the witness was re-sworn had any adverse consequences for the Appellant. The transcripts of the trial show that the Commissioner did begin speaking to the Advocates before the Appellant was brought into court on one occasion during the course of the trial. The Appellant was not prejudiced in any way by that happening as the transcript clearly demonstrates - see transcript for Day 4 page 2. 102. In our judgment none of the four points summarised in paragraph 100 above begin to demonstrate that a miscarriage of justice has occurred. 103. The Appellant argues that Advocate Thomas behaved improperly when, at the close of his submissions in response to the submissions of Advocate Bell, he submitted to the Commissioner that if he (the Commissioner) was going to uphold the submission of no case the Crown would seek leave

to amend the Indictment to add a count of manslaughter. The Appellant maintains that this was exerting improper pressure upon the Commissioner to reject the submission of no case and forms the substance of his complaint under the heading Prosecution pressurizing putting pressure on judge Regarding half time submissions . 104. It was nothing of the kind. As we have already pointed out, the submission of no case to answer was put on the narrow ground that there was no evidence to prove the requisite intent for murder. Advocate Bell had conceded that there was evidence fit to be considered by the jury that the Appellant had killed Ms Besenyei unlawfully. The trial had been conducted on the basis that a verdict of not guilty of murder but guilty of manslaughter was a potential alternative verdict to guilty of murder. In those circumstances it was inevitable that if the Commissioner had ruled that there was no evidence to justify the charge of murder being considered by the jury because the necessary intent could not be proved, he would be asked to permit an amendment so that a charge of manslaughter could be considered. 105. In our judgment, there is also no basis for concluding that the Commissioner improperly pressurised the jury into reaching their verdict. 106. As we have said, after the jury had been in retirement for 5 hours and 45 minutes the Commissioner gave a majority direction. That, he was fully entitled to do. The relevant part of his direction was as follows: "... I have asked you to come back because you have been out for a little while now and so I think I wanted to tell you that you should still be unanimous ... But if you really cannot agree all of you on a verdict the time has now come when I can accept a majority verdict. That is a verdict on which either 10 or 11 of you are agreed. In other words it has to be a minimum of 10. And that would be 10 in favour of murder, or 10 in favour of manslaughter or 10 in favour of not guilty ... If at the end of the day you really cannot reach a verdict on which at least 10 of you have agreed, then it is right that you should know that by the law of the Island the consequence would be that the Defendant would be discharged from these proceedings and therefore there will be no conviction. I am telling you that simply because that is the law of the Island and it important that juries are aware of what the position is, but in saying that I am most certainly not imposing any pressure or trying to put any pressure on you to reach a verdict. You must have your discussions for as long as you like and reach your decisions, whatever they may be, in accordance with your conscience...." 107. The Appellant argues that when the Commissioner used the phrase " at the end of the day " at the beginning of the second paragraph above he was directing the Jury that they had to reach a verdict by the end of that sitting day. This direction was given at shortly after noon on Friday 3 December 2021. The Jury knew that the time estimate for the trial had been 10 days and they might reasonably have thought, maintains the Appellant, that they had until the close of the court that afternoon to reach a verdict. 108. We do not agree. The phrase " at the end of the day " is to be understood in its context. It is often used to mean " ultimately ". In our judgment that is how it would have been understood by the Jury in the context in which the phrase was used in this case. As part of the same direction the Commissioner had told the Jury to have " your discussions for as long as you like ". At the close of his summing-up on the previous day the Commissioner had directed the Jury to take as long as they liked for their deliberations. In our judgment,

there is no realistic possibility that the Jury thought that there was any time limit on their deliberations or that they thought that they had to conclude their discussions by the end of Friday 3 December 2021. In our judgment there is no basis for the complaint that the Commissioner pressurised the Jury into reaching a verdict. 109. The Appellant is now disposed to criticise Advocate Bell for his conduct of his defence. In particular, there are passages in his written grounds in which he suggests that a point was not made or that it was not made forcefully enough during the cross-examination of witnesses. We do not propose to identify the points made by the Appellant to that effect for the simple reason that having read the transcripts of the evidence we can find no basis upon which to conclude that Advocate Bell's cross-examination of witnesses was other than pertinent and effective. 110. However, it is necessary for us to deal with one discrete complaint made by the Appellant against Advocate Bell. The complaint is that Counsel did not send or otherwise disclose to the Appellant the report which had been obtained from Dr Shepherd, the pathologist instructed on the Appellant's behalf and that when (on a number of occasions) the Appellant asked for a copy of the report Advocate Bell refused to provide him with the same. 111. On this issue Advocate Bell has sworn an Affidavit which is dated 16 May 2022 and to which the report of Dr Shepherd is exhibited. At paragraph 14 of the Affidavit, he says that Dr Shepherd provided his report to the Defence lawyers on 28 February 2019 which was shortly before the first trial began on 4 March 2019. His Affidavit continues: "I would expect that we gave Mr. Warn a copy of Dr Shepherd's report but I am unable to find any record to confirm this." At paragraph 18 he categorically denies that he refused to send a copy of the report to the Appellant. 112. We are prepared to assume, without making a definitive finding, that the Appellant did not receive a copy of the report. We do not accept, however, that Advocate Bell refused to send the Appellant a copy. That is highly improbable in our judgment. 113. What follows from the above? It seems quite clear to us, as Advocate Bell says and the Appellant was disposed to accept in his oral submissions, that the contents of the report were discussed at some length since, inevitably, an informed decision had to be made about whether Dr Shepherd should be called as a witness. It seems inconceivable to us that the Appellant was not familiar with the contents of the report from shortly after the time it had been received. It is very instructive, of course, that the Appellant makes no complaint in his written contentions about the fact that Dr Shepherd was not called to give evidence. In our judgment, that is because he was always familiar with the contents of Dr Shepherd's report and he was content to accept the advice tendered to him by Advocate Bell that Dr Shepherd should not be called as a witness. 114. In our judgment the Appellant's complaint against Advocate Bell as it relates to the report of Dr Shepherd is incapable of founding a realistic ground of appeal. It certainly does not begin to establish that a miscarriage of justice has occurred. 115. Finally, we turn to a complaint made by the Appellant as to what occurred at his sentencing hearing on 21 March 2022. Essentially, the Appellant complains that the Crown produced documents for the assistance of the Royal Court which were misleading and which contained factual errors. On close inspection of this complaint, it amounts to an assertion by the Appellant that the Crown was somehow precluded from informing the

sentencing court of the substance of the case against the Appellant, because, in the view of the Appellant, the case against him had not been made out. He appears to be arguing that since the circumstantial evidence rehearsed throughout this judgment did not justify his conviction no sentence or some lesser sentence should have been imposed, although it is far from clear to us precisely how the Appellant would have us deal with his complaint about the sentencing hearing. 116. In any event, the Appellant's complaint is ill-founded. There are three reasons why this is so. First, the Crown's presentation of the facts to a sentencing court following a conviction cannot have any bearing upon whether the accused person was wrongly convicted when, as here, the presentation of the facts adhered strictly to the evidence upon which accused person was tried. Second, there was no misleading of the sentencing court and there were no errors of fact relayed to the court. The Crown simply explained the basis of the case against the Appellant which, by then, had been accepted by the Jury. Third, the Jury had convicted the Appellant. The sentencing court was obliged by law to pass the mandatory life sentence and fix the minimum term which the Appellant must serve before becoming eligible for release. It was not open to the sentencing court other than to proceed to sentence.

Conclusion

117. We have reached the clear conclusion that the Appellant has failed to advance grounds of appeal which have any realistic prospect of persuading this Court that his conviction should be quashed. Accordingly, we refuse the Appellant's application for leave to appeal against his conviction. *Authorities Warn v The Attorney General*

[2019] JCA 144 *Warn v The Attorney General*

[2021] JCA 337. Criminal Justice (Evidence and Procedure) (Jersey) Law 1998. Court of Appeal (Jersey) Law 1961. Criminal Procedure (Jersey) Law 2018. Criminal Procedure (Statements and Evidence) (Jersey Rules 2019). Galbraith [1981] 1WLR 1039. Blackstone's Criminal Practice 2021. Page Last Updated: 21 Jun 2022 Back to top About JLIB Accessibility Contacts Disclaimer Feedback Privacy policy Site map © Jersey Legal Information Board 2001- This website is not compatible with your web browser. You should install a newer browser . If you live in Jersey and need help upgrading call the States of Jersey web team on 440099. BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII

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