Judgment 20/2007 **Steven Malcolm Edward Presland – Court of Appeal (Criminal Appeal 366) – 4th July 2007**

Rape – appeal against conviction - interruptions by the Lieutenant Bailiff unobjectionable given the diffidence of the witness – summing up fairly set out the strengths and weaknesses of the prosecution case – verdict not obviously and palpably wrong – leave to adduce further evidence as to alibi refused – tests as adopted in the appeal of Collins applied – leave to appeal against sentence refused – guidelines in Millberry applied

IN THE COURT OF APPEAL IN THE ISLAND OF GUERNSEY

No. 366

Criminal

The 4th day of July, 2007 before Geoffrey Robert Rowland, Esquire, Bailiff, President, Dame Heather Steel, D.B.E., and David Arthur John Vaughan, Esquire, C.B.E. Q.C.

THE LAW OFFICERS OF THE CROWN

v

STEVEN MALCOLM EDWARD PRESLAND

In the matter of applications for leave to appeal against conviction and against sentence, from decisions of the Royal Court on 8th December, 2006 and 19th February, 2007, respectively;

THE COURT, having on 2nd July, 2007, heard Advocate P.T.R. Ferbrache for the Appellant and Crown Advocate G.D. McKerrell thereon, this day GAVE JUDGMENT in the attached terms and:-

1. GRANTED leave to appeal against conviction;
2. REFUSED an application for leave to adduce further evidence;
3. DISMISSED the appeal against conviction; and
4. DISMISSED the application for leave to appeal against sentence.

AND THE COURT ORDERED, under Section 23 of the Children and Young Persons (Guernsey) Law, 1967, that the newspaper and other media shall not in any report of these proceedings reveal the name, address or school, nor refer to any particulars calculated to lead to the identification, of the children and young persons who were the complainant and witnesses in these proceedings.

K H TOUGH
Registrar of the Court of Appeal.

Final Text
10 August 2007

IN THE COURT OF APPEAL
OF THE ISLAND OF GUERNSEY

Wednesday 4 July 2007

Between

STEVEN MALCOLM EDWARD PRESLAND — **Appellant**

v

THE LAW OFFICERS OF THE CROWN — **Respondent**

Before

Geoffrey Robert Rowland, Bailiff, President
Dame Heather Steel, DBE
David Arthur John Vaughan, CBE QC

STEEL, H:

This is the judgment of the Court

1. On the 8th December 2006 the Appellant STEVEN MALCOLM EDWARD PRESLAND, who is now aged 25 years of age was convicted in the Royal Court of an offence of Rape. The particulars of the offence were that between 1st January 2005 and 24th June 2005 in the parish of St Martin he had unlawful sexual intercourse with the Complainant without her consent. At the time of the offence the Complainant was 15 years of age.

2. On 19th February 2007 the Appellant was sentenced to six years and six months imprisonment followed by an extension period of five years as provided for in Section-3 of the Criminal Justice (Supervision of Offenders) Law 2004 during which he will be subject to an Extended Sentence Licence, such sentence to reckon from 8th December 2006.

3. The Appellant appeals his conviction, with our leave, and seeks leave to appeal his sentence.

4. The grounds upon which the Appellant, in his amended Notice of Appeal, appeals his convictions are

   (1) that there has been a miscarriage of justice generally with regard to the number and nature of interruptions of the Lieutenant Bailiff during the trial which impeded and undermined the defence and assisted the prosecution in putting forward their case and further (a ground added immediately prior to the Appeal hearing but regretfully without any particularity) that the summing up was inadequate in that inter alia it failed to point out adequately the inconsistencies in the prosecution evidence.

(2) That the verdict was obviously and palpably wrong and/or could not be reasonably supported having regard to the evidence.

5. It is not in issue that the law and the considerations to be applied to the appeal are set out in Section 25 (i) of the Court of Appeal (Guernsey) Law 1961 which reads

> *"The Court of Appeal on any such appeal against conviction shall allow the appeal if it thinks that the verdict should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence, or that the judgement of the Court before whom the Appellant was convicted should be set aside on the grounds of a wrong decision of any question of law or that on any ground there was a miscarriage of justice and in any other case shall discuss the appeal."*

6. The relevant authorities are:

Law Officers of the Crown v Ogier and Le Noury Court of Appeal 6/4/89 (7 GLJ 17,20 and 25)in which the Court of Appeal stated that *"a verdict would only be set aside in the rare case where a verdict was obviously and palpably wrong"* and Law Officers of the Crown v Heather Helen Guest Court of Appeal 9/1/03 (Judgment 8/2003) in which Clarke JA stated *"generally this Court is considering the verdicts of the Jurats in the Royal Court. Such verdicts are not 'speaking verdicts' and it is not therefore possible to discern by what process of reasoning, or the lack of it, the Jurats have reached their conclusions. In those circumstances if the summing up is sound the Court may well not be able to interfere unless the verdict is obviously wrong."*

7. The Appellant also seeks leave to appeal his sentence on the basis that:

i) the starting point was too high

ii) insufficient discount was awarded with respect to the Appellant's mitigation

iii) the Extended Sentence Supervision Order coupled with the sentence of imprisonment was manifestly excessive.

8. We are grateful to Advocate Ferbrache on behalf of the Appellant and Advocate McKerrell on behalf of the Respondent for their helpful written and oral submissions. Neither Advocate appeared at the trial.

9. The Appellant applied to this Court for leave to file additional evidence, and the Court was invited to consider affidavits from Sheila May Ogier (who attended the trial but did not give evidence) and a witness Peter Lesbirel who had given evidence at the trial, but sought to expand his evidence in relation to the alibi.

10. We considered this application before the issues raised in the appeal and refused leave to file additional evidence for the reasons we now set out.

11. It was submitted that the further evidence could have had considerable probative value in establishing an alibi for the Appellant in relation to the four nights in April and May 2005 during which the allegation made by the

Complainant could have occurred. From a widely drafted time frame the possible dates had been established in evidence given by witnesses at the trial. Peter Lesbirel, a disqualified driver and Matin Miah, a restaurant manager who employed him, had given evidence to the Jurats in support of an alibi for the period 6 p.m. to 10.30 p.m. at weekends when the Appellant drove Lesbirel to make food deliveries for the restaurant.

12. Peter Lesbirel's affidavit sought to expand the alibi to the effect that together with Appellant he was engaged in a cleaning business at weekends until 12.30 a.m. and Sheila May Ogier sought further to expand the alibi in relation to a period on Saturday evenings from midnight for a couple of hours when the Appellant, her nephew, was said to have returned from his work at the restaurant to assist her in stuffing envelopes.

13. It was submitted that this information, if admitted, could be relevant to cast doubt on the credibility of the Complainant and would have weighed heavily with the Jurats. We were referred to s32(1)(b) of the Guernsey Court of Appeal Law of 1961 which states *"for the purposes of this Part of this law the Court of Appeal may, if it thinks it necessary or expedient in the interests of justice*

a)……

b) order any witnesses who would have been compellable witnesses at the trial to attend and to be examined before the Court, whether they were or were not called at the trial."

this provision is identical to the text of s9 of the Criminal Appeal Act 1907 of England.

14. The Court of Appeal in Guernsey on 6th July 1989 considered this section in The Law Officers of the Crown v James Paul Collins (8 GLJ 16 and 27) and adopted the four principles set out by Lord Parker CJ in R v Parks 1961 46 Cr App R. 29 which were summarised –

i) the evidence that it is sought to be called must be evidence which was not available at the trial

ii) it must be evidence relevant to the issues

iii) it must be evidence which is credible evidence in that it is well capable of belief

iv) whether, after considering the evidence, there might have been a reasonable doubt in the minds of the Jury as to the guilt of the Appellant if that evidence had been given together with the other evidence at the trial.

15. The Respondent submitted that if the Court is satisfied that the test set by the first principle is not overcome by the Appellant on the basis that the evidence it is now sought to call was evidence that was available at the trial, then the court need not go on to consider the other three principles. We accept this submission, and considered whether the evidence the subject of this application was available at the time of trial.

16. Advocate Ferbrache accepted that the evidence had been available at the trial but that the Appellant's advocate did not know of it, as the Appellant did not bring it to her attention. Sheila May Ogier, from her affidavit, did not mention to the advocate the Appellant's work with her as she did not think it relevant. The Respondent further cited the case of R v Beresford 56 Cr App R 143 which held that the Court had to be satisfied that evidence was not only relevant and credible but also that there was a reasonable explanation for the failure to adduce it. At p 149 the English Court of Appeal concluded that "reasonable diligence must necessarily include the need for the accused himself to play a proper part in assisting the preparation of the defence. Nowhere is that more important than in the case of an alibi, a defence raising facts which are most importantly within the knowledge of the accused; it is plainly necessary for him to use all reasonable diligence in assisting the preparation of a defence of that nature. In the instant case it is clear that, assuming for the moment the alibi was a true one no such part was played by the Appellant"

17. In the present case the Appellant, who was aware of the nature of the complaint and the fact that an overnight stay was alleged, clearly failed to bring to the attention of his trial advocate the material on which he now seeks to rely and of which he must have been aware at the time of his trial. The Appellant simply chose not to tell his legal team about it. This is not fresh evidence which was not available at the time of the trial, it was available and could have been called then.

18. Advocate Ferbrache submitted that the delay in both complaint and prosecution made this an unusual case, further he reminded the court that the evidence of the Complainant stood alone in relation to the rape. However unusual the case, this has no bearing on our conclusion that the evidence sought to be called cannot fall within s 32 (1)(b) of the Court of Appeal (Guernsey) Law and should not be admitted.

19. We turn now to the appeal against conviction and briefly set out the facts as relied on by the prosecution.

20. The Complainant was at school with the witness B. They were about the same age and were friends. From time to time the Appellant would take the two girls, together with other young people, out for a drive in his car. He would also invite them to a bunker that he leased at Jerbourg with Peter Lesbirel. The bunker had several rooms and was used both for the storage and repair of cars but was also furnished for relaxation and recreation. Drinks, both soft and alcoholic, food and a microwave were kept there. There was television, DVDs, music from a play station, videos, a sofa and bedding so that young people found it attractive to go there. Power and lights were provided by a petrol generator.

21. One evening in the late spring of 2005, B and the Complainant were at the Complainant's house when B received a telephone call from the Appellant. He invited them for a spin in his car and collected them from the Complainant's home and took them to the bunker. A friend C also went to the bunker as did some other youngsters. At the bunker the girls were offered drink. The Complainant had several including alcoholic drinks. She described her condition as chatty. At some stage in the evening the Complainant and C left the bunker and on their return they went to a separate room from where the

others were watching television and lay down on a put-up bed in the workshop to go to sleep. The Complainant was wearing jeans, knickers, bra, t-shirt and coat.

22. The Complainant woke to find the bed covers not covering her body, her t-shirt and bra were pulled up and the Appellant was beside her sucking her exposed breast. According to the Complainant C was not there. C's evidence was to the effect that she remained in bed beside the Complainant all night. The Appellant then pulled down the Complainant's jeans and pants and raped her. She did not resist. She pretended to be asleep. She heard him say "you're my little fuck bunny" and she was afraid and started to cry quietly. The Appellant got off her, he pulled the bed covers back over her and she fell asleep.

23. Next morning the Appellant drove the Complainant and B home, dropping B and another girl off first, then when the Complainant was dropped at her home the Appellant asked her if she remembered anything from the previous night and she said no. The Complainant did not attend B's birthday party at the bunker in early May 2005.

24. No complaint was made until June of 2005.

25. On 15th June the Appellant's room was searched and on 16th June the bunker was searched.

26. On 29th June 2005 the Complainant was interviewed on video by a police officer and a transcript of that interview was with the Jurats when they considered their verdict. The Appellant was arrested on 12th July 2005 and interviewed under caution during which he made no replies.

27. The Appellant was again arrested on 18th April 2006 and his trial took place in December 2006.

28. Evidence at the trial was given by the Complainant whose account was in some respects inconsistent with that given in her video interview, and her credibility was tested in cross examination. Her evidence was that until the matter complained of she visited the bunker about once a week at the weekends and in cross examination the weekends relevant to this case were identified as between late April early May 2005.

29. DC Breban gave evidence describing the bunker with reference to photographs and a plan.

30. B and C gave evidence and were cross examined as to the inconsistencies in their accounts.

31. A submission of 'no case' was rejected by the Lieutenant Bailiff at the close of the prosecution case. The Appellant gave no evidence but Peter Lesbirel and Matin Miah were called to describe the Appellant's assistance as driver to Peter Lesbirel who worked for Matin Miah in the evenings of Friday and Saturday from approximately 6 p.m. to 10 p.m.

32. WDC Nicky Shepherd gave evidence regarding her investigation of an allegation of harassment against the Appellant by the Complainant in 2006 and of an occasion in September 2005 when she attended an incident in which she

discovered the Complainant drunk and calling out that she'd been raped four times by the Appellant.

33. The first ground of appeal concerns the number and nature of the interruptions by the Lieutenant Bailiff during the trial which the Appellant claimed impeded and undermined the defence and assisted the prosecution in putting forward their case.

34. When she gave her evidence the transcript shows that the Complainant was diffident in the extreme and had to be repeatedly questioned when her answers were indistinct or inaudible. In relation to the rape allegation the Complainant has to be invited to write down what she wanted to say and she did so. The advocate for the prosecution was clearly having some difficulty in examining the witness and Advocate Ferbrache identified 136 instances of 'no audible answer'. We have examined the transcript and the occasions when the Lieutenant Bailiff intervened and are satisfied that he did no more than attempt to persuade the Complainant to give answers to questions already asked and at no stage did his interventions undermine the defence or assist the prosecution. There was one instance when he fairly explored an issue put to the Complainant by the defence which was, in the circumstances, in our view unobjectionable. In his summing up the Lieutenant Bailiff said "*Before considering their evidence you may wish to bear in mind that the response 'I don't know' tends to flow more easily from the lips of a teenager than most adults. Counsel have not had the easiest of tasks eliciting facts from particularly the Complainant and B. I mention this because there is an old saying, allegedly from Francis Bacon, that 'a much talking judge is like an ill- tuned cymbal'. At times I felt it was necessary to assist by asking questions more than with an adult. My intervention's which were comparatively small in volume, were limited to seeking to provide a proper framework in which both Advocates could carry out their duties fairly and efficiently and to make sure that you and I understood what was being said as clearly as possible.*"

35. We are satisfied that he correctly described the purpose and impact to the Jurats of his interventions.

36. The additional and rather general second ground of appeal before the court was that the summing up was inadequate in that it failed sufficiently to point out the inconsistencies in the prosecution evidence.

37. No complaint is made in any other respect regarding the summing up.

38. Advocate Ferbrache submits that the Lieutenant Bailiff should have highlighted the various inconsistencies in the evidence for the Jurats, treated them as a jury, and addressed them accordingly. Advocate Russell for the prosecution in her closing submissions specifically drew the Jurats' attention to the number of differences from the Complainant's evidence in court and other accounts she had given of the events that took place and which had been pointed out to her. One important difference was whether the Appellant had left the room during the incident complained of. The inconsistencies had also been highlighted by Advocate Haskins at the close of a short trial. Having carefully considered the transcript of the summing up we are satisfied that the inconsistencies were all sufficiently particularised for the Jurats by the Lieutenant Bailiff who fairly and fully set out the defence. The Jurats were well aware of the issues and the

strengths and weaknesses of the prosecution case. There is no merit in this additional ground of appeal.

39. The third ground of appeal is that the verdict is obviously and palpably wrong. Advocate Ferbrache relies on the chronology which demonstrated a significant delay between the incident and complaint, then further significant delay after the Appellant's first arrest and interview and his arrest in April 2006.

40. Further Advocate Ferbrache submits correctly that there is here no evidence of resistance or protest, no evidence of recent complaint and no medical or forensic evidence capable of supporting the allegation. There was no police involvement until the Appellant's home was searched on 15th June 2005, thereafter the Appellant made no admissions and gave no replies in answer to police questioning. The only evidence before the Court in support of the allegation was that of the Complainant herself and he questioned her credibility. These matters were all before the Jurats and the Lieutenant Bailiff fully and fairly reminded the Jurats of the issues of fact and in relation to credibility. The summing up set out all the matters for the Jurats to decide and he directed them carefully in relation to the law.

41. Applying the tests set out in The Law Officers of the Crown v Ogier and Le Noury and The Law Officers of the Crown v Heather Helen Guest, and being satisfied that the summing up is sound we do not conclude that this is one of those rare cases where the verdict should be set aside on the basis that it was obviously and palpably wrong.

42. Accordingly the appeal against conviction is dismissed.

43. We turn now to the appeal against the sentence of six years six months and an Extended Licence Supervision period of five years which it is submitted is together manifestly excessive.

44. With reference to the leading English authority of Millberry and others v R (2003 1 Cr App R25) and applying the guidelines set out in that case, the court adopted a starting point of seven years which was reduced by six months. The Extended period and Licence was specifically stated to be appropriate in the light of the circumstances and a recommendation in the Probation Report to prevent the commission of future offences by him and to secure the Appellant's rehabilitation.

45. The six and a half year sentence was stated to take into account two aggravating features, being the youth of the Complainant and the Appellant's previous convictions in the Guernsey Magistrates' Court in 2000 for offences against an eleven year old boy committed over a period of ten months at a time when the Appellant was sixteen or seventeen years of age. For these offences the Appellant was sentenced to 8 months Youth Detention suspended for two years.

46. Advocate Ferbrache submits that the court failed to take into account the fact that the Complainant was not a virgin at the time of the offence when considering aggravation by reason of her age and invited the court to consider the circumstances of the Appellant's previous conviction.

47. We have considered the submissions with care and conclude that the sentence passed in its totality, including the Extended period, was entirely appropriate for the offence in all the circumstances of the case.

48. It cannot be argued that the sentence is manifestly excessive and the application for leave to appeal sentence is refused.

