Judgment 27/2013

X v Law Officers of the Crown
Royal Court
16th September 2013

Appeal from the Juvenile Court against conviction in respect of three specimen charges of indecent assault.

Approved Text
16.09.2013

IN THE ROYAL COURT OF GUERNSEY

Between

X

Appellant

-v-

The Law Officers of the Crown

Respondent

Before Richard James McMahon Esq., Deputy Bailiff

Appeal Against Conviction hearing date: 6th September 2013 (PM only)
Decision handed down: 9th September 2013

Advocate for the Appellant: Advocate A M Merrien
Advocate for the Respondent: Crown Advocate F M Russell

Cases and materials referred to in the Judgment:-

The Criminal Justice (Children and Juvenile Court Reform) (Bailiwick of Guernsey) Law, 2008
The Magistrate's Court (Criminal Appeals) (Guernsey) Law, 1988
The Human Rights (Bailiwick of Guernsey) Law, 2000
The Court of Appeal (Guernsey) Law, 1961
Law Officers of the Crown v Diment (1993) 16.GLJ.86
Law Officers of the Crown v Whales (1993) 16.GLJ.87
Pinto, Loreto and Almeida v Law Officers of the Crown (unreported, 24 May 2013)
Taylor v Law Officers [2007-08] GLR 207
Law Officers of the Crown v Guest (unreported, 9 January 2003; [2003-04] GLR N-7)
Aladesuru v R [1956] AC 49
AG v O'Brien [2006] JLR 133
Law Officers of the Crown v Ogier and Le Noury (1989) 7.GLJ.17
R v JTB [2009] 3 All ER 1
The Crime and Disorder Act 1998
C v DPP [1996] AC 1
Report of the Royal Commission appointed to enquire into the criminal laws of the Channel Islands 1846-8
The Children and Young Persons (Guernsey) Law, 1967
Attorney General v W [2008] JLR Note 6

Introduction

1. This is an appeal against conviction in respect of three specimen charges of indecent assault. The periods covered run from January 2011 to July 2012.

2. The Juvenile Court heard the evidence against a defendant to whom I will refer as "X", the Appellant, on 18 and 19 June 2013 and found the Appellant guilty at the end of the second day of trial. Oral evidence was given by the complainant, who is a younger relative of X, a social worker and a police officer, as well as from the Appellant himself. Other agreed evidence was adduced, including the police interviews held with the Appellant shortly after the complaints came to light in the summer of 2012 and medical evidence. The Appellant was sentenced on 4 September 2013 to a two-year Supervision Order.

3. Two main grounds of appeal have been extracted by Advocate Merrien from the Notice of Appeal dated 26 July 2013, in which it is alleged that the Juvenile Court "*reached a conclusion on the facts which no reasonable tribunal properly directed could have reached on the evidence presented*". The first relates to the capacity of the Appellant and touches on the doctrine known as *doli incapax*. The second relates to the inconsistencies in the evidence of the complainant being so substantial and significant that her evidence should have been regarded as too unreliable to support the convictions.

4. In the short time available, Advocate Merrien and Crown Advocate Russell, on behalf of the Appellant and the Law Officers of the Crown respectively, produced short Skeleton Arguments accompanied by authorities. Those documents and their helpful and measured oral submissions, for which I am grateful, have been of considerable assistance.

Right to appeal

5. The Criminal Justice (Children and Juvenile Court Reform) (Bailiwick of Guernsey) Law, 2008 deals with trials of children. Following a trial in the Juvenile Court, section 5(4) provides:

> "*The provisions of the Magistrate's Court (Criminal Appeals) (Guernsey) Law, 1988 shall apply to and in respect of appeals from the Juvenile Court as those provisions apply to and in respect of appeals from the Magistrate's Court.*"

Other matters are expressly covered in the 2008 Law, such as the persons who may be present in the Juvenile Court (section 8). Unlike section 11, which deals with reporting restrictions, there do not appear to be any equivalent provisions to section 8 in respect of appeals to this Court. However, I decided to exercise the inherent jurisdiction of the Court to sit in private and did so on a similar basis to how it was dealt with before the Juvenile Court. I indicated, however, that in the interests of open justice, this judgment, being suitably anonymised, would, after being handed down, be made available publicly.

6. The Magistrate's Court (Criminal Appeals) (Guernsey) Law, 1988, section 2(1), contains a number of limitations on the right to appeal:

> "*No right of appeal shall arise under this Law –*
>
> *(a) in any case where it is expressly provided by any other Law or by any Ordinance that the decision of the Magistrate's Court shall be final and conclusive, or*
>
> *(b) against the conviction of any person for an offence to which that person has pleaded guilty, or*
>
> *(c) against the sentence pronounced against any person where the punishment awarded does not exceed one or more of the following penalties –*
>
> *(i) imprisonment for a term of 7 days, or*

(ii) a fine of level 2 on the uniform scale, with or without costs, or
(iii) payment of compensation in an amount of £75,
(iv) confiscation of goods to the value of £75, with or without costs, or
(v) suspension for 7 days of any licence or permit with or without costs, or

(d) against the conviction of any person if the punishment awarded in respect of such conviction does not exceed one or more of the penalties mentioned in section 2(1)(c) above unless, on the application of the person concerned, the Magistrate's Court certifies that a question of law or of mixed law and fact is involved."

7. The Appellant was sentenced to a Supervision Order. Such a sentence is not referred to in section 2(1). I am satisfied that this means that section 2(1)(d) is not engaged and that no certificate that a question of law or of mixed law and fact is required. This is because, on my construction of section 2, the limitations on the right to appeal apply only to the disposals covered by the sentences actually mentioned in section 2(1)(c) and all other disposals necessarily confer a right of appeal. Indeed, although it is not necessary to resolve the issue in this case, I think it must remain an open question as to whether removing the right to appeal against conviction in the manner section 2(1)(d) does can be regarded as compatible with a person's Convention rights under the Human Rights (Bailiwick of Guernsey) Law, 2000.

Test applicable on appeal

8. Counsel agreed on the approach the Court is required to take. The 1988 Law does not specify the basis on which an appeal is instituted. However, a further appeal from this Court to the Court of Appeal is available under section 7 of the Law, under which Part III of the Court of Appeal (Guernsey) Law, 1961 applies. Section 25(1) of the 1961 Law provides:

> "*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 judgment of the court before whom the appellant was convicted should be set aside on the ground 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 dismiss the appeal:*
>
> *PROVIDED that the Court of Appeal may, notwithstanding that it is of the opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred.*"

That this provision provides the test that the Court of Appeal applies to an appeal from a decision of the Magistrate's Court was confirmed in *Law Officers of the Crown v Diment* (1993) 16.GLJ.86. The grounds of appeal advanced on behalf of the Appellant, even though in large part focussing on the facts, raise questions of law for determination by a judge sitting without Jurats (*Law Officers of the Crown v Whales* (1993) 16.GLJ.87).

9. This Court therefore approaches appeals from the Magistrate's Court or, as here, from the Juvenile Court on the same basis, namely by adopting the bases for appeal set out in section 25(1) of the 1961 Law. Accordingly, the guidance as to the correct approach where the rationality of the factual conclusions is challenged given by the Court of Appeal is equally applicable, with appropriate adjustments of terminology, to an appeal to this Court under the 1988 Law.

10. In *Pinto, Loreto and Almeida v Law Officers of the Crown* (unreported, 24 May 2013), the Court of Appeal followed guidance given by Beloff JA in *Taylor v Law Officers* [2007-08] GLR 207 which it distilled into the following principles:

> "*[1] The jurisdiction of this Court is defined by the 1961 Law and the powers of the Court are more limited than those enjoyed by the Court of Appeal (Criminal Division) in England and Wales which incorporates the concept of an 'unsafe' verdict, and, by judicial gloss, that of a lurking doubt.*
> *[2] In assessing the rightness or wrongness of the verdict, the Court of Appeal must at all times bear in mind that the function of fact finding has been left to the lower court and that, particularly where credibility is in issue, the lower court, notoriously, has the advantage, denied to the Court of Appeal, of seeing and hearing the witnesses including, most importantly, the defendants.*
> *[3] The verdict of Jurats is to be treated with particular deference since, as Le Quesne, J.A. observed in Tilley v Law Officers C.A., November 27th, 1973, unreported (Guernsey C.A. Judgments 1964-1989, 88), "the Jurats are holders of judicial office and are far more experienced in the affairs of law and legal procedure than the normal juryman in the United Kingdom." A challenge to their verdict as unreasonable is especially difficult to make good.*
> *[4] The verdict of Jurats does not normally disclose the reasons upon which the verdict is based, thus: "If the summing up is sound the court may well not be able to interfere unless the verdict is obviously wrong" (Guest v The Law Officers; (2003) GLR N-7).*"

11. In relation to the third of those principles, the deference to be afforded to the Judge of the Royal Court who heard the Appellant's case in the Juvenile Court must, in my view, be at least as great as that afforded to the Jurats. Further, unlike the decisions of the Jurats, this Court has the benefit of a reasoned decision from the Juvenile Court. As Clarke JA indicated at para. 12 of *Law Officers of the Crown v Guest* (unreported, 9 January 2003):

> "*... where, as here, the verdict is one of a legally qualified Magistrate it is a "speaking" verdict because the Magistrate has to state reasons for his verdict in his judgment. In such a case it is possible for this Court to review the magistrate's process of reasoning, and to consider whether, by that process, the Magistrate has reached a verdict which is "unreasonable", or one which "cannot be supported having regard to the evidence" or whether "any any ground there has been a miscarriage of justice".*"

In para. 13, the Court further explained that "*The fact that the Magistrate's verdict is more easily reviewable because his process of reasoning is patent does not, however, alter the statutory test*".

12. In the *Pinto* case (*supra*), Montgomery JA also referred to what Lord Tucker had had to say in *Aladesuru v R* [1956] AC 49 about the constraints imposed by a statute with a similarly worded basis of appeal conferring only "*a limited appeal which precludes the court from reviewing the evidence and making its own evaluation thereof*". Those words were quoted with approval in the Jersey case of *AG v O'Brien* [2006] JLR 133, where it was also that that "*It is not the function of the Court of Appeal to say that the evidence of the accused should have been accepted*".

13. The test, therefore, for setting aside a verdict on a question of fact alone remains that set out in *Law Officers of the Crown v Ogier and Le Noury* (1989) 7.GLJ.17, namely whether it is "*obviously and palpably wrong*". It is certainly not for this Court to substitute its own opinion for that of the Juvenile Court. For one thing, I have not had the benefit of seeing the demeanor of the witnesses. All I can do when reviewing the evidence is to rely on the more sterile nature of the printed words of the transcript and other evidence. Advocate Merrien quite properly accepted that he needed to persuade the Court that the Judge below had gone so far outside the range of possible conclusions on the facts that this was, as he submitted it was, one of those rare cases justifying an appellate court interfering with the conclusions and verdicts.

Doli incapax

14. This appeal raises the question of whether this doctrine, as recognised in English law, exists (or existed) in Guernsey law. Crown Advocate Russell submitted that her researches indicated that it did not. Advocate Merrien submitted that "*the Judge reached an incorrect conclusion havi regard to the evidence*" and proceeded to question whether there had been adequate evidence of the Appellant having the requisite capacity in relation to each of the three specimen charges. He noted that, in his decision, the Judge had referred to "*survival*" of the doctrine rather than questioning whether it had ever existed.

15. This issue was dealt with by the Judge as follows (at page 196, transcript):

> "*I have very carefully considered the Defendant's evidence in the light of his police interviews. Having done so and assessed what he's said and his demeanour in Court, I entertain no doubt as to his capacity inasmuch as that is an issue.*
> *I make this finding to the criminal standard and consider I am entitled to do so on the material before the Court. In other words, technically, if a presumption of Doli incapax has survived in Guernsey law, it is it is rebutted on the facts of this case.*"

The question of the Appellant's capacity was addressed by Advocate Merrien at the beginning of his closing submissions (see pages 181-3 of the transcript). He referred to the Policy Letter leading to the 2008 Law, to which I will turn in more detail shortly, suggesting that there was recognised to be a presumption on capacity that could be challenged. His submissions to the Juvenile Court do not appear to assert that it was for the prosecution to rebut the presumption against criminal responsibility, but it is not entirely clear the manner in which he was using the Appellant's lack of capacity in his defence.

16. I will deal first with the doctrine and take the description of it from the speech of Lord Phillips of Worth Matravers in *R v JTB* [2009] 3 All ER 1:

> "*3. Until the last century the criminal responsibility of children and young persons was determined by the judges, as a matter of common law. A child under seven was incapable of incurring criminal responsibility. This incapacity was described by the Latin phrase doli incapax. Between the ages of seven and fourteen a child was presumed to be doli incapax. This presumption could be rebutted by proving that a child who had committed an act prohibited by the criminal law knew that he was doing something that was wrong.*
> *4. Parliament intervened by s 50 of the Children and Young Persons Act 1933. This provided: 'It shall be conclusively presumed that no child under the age of eight years can be guilty of any offence.' The age of eight years was increased to ten by s 16 of the Children and Young Persons Act 1963. Throughout this time the position of a child under the age of 14 years remained governed by common law.*"

That case also contains a helpful review of the operation of the presumption, but held that section 34 of the Crime and Disorder Act 1998 had abolished both the presumption for children aged 10 to 14 and the defence of doli incapax.

17. Before the enactment of the 1998 Act, the doctrine had been subjected to forceful judicial criticism, eg, Laws LJ in *C v DPP* [1996] AC 1, 11:

> "*The rule is divisive and perverse: divisive, because it tends to attach criminal consequences to the acts of children coming from what used to be called good homes more readily than to the acts of others; perverse, because it tends to absolve from criminal responsibility the very children most likely to commit criminal acts. It must surely nowadays be regarded as obvious that where a morally impoverished upbringing may have led a teenager into crime, the facts of his background should not go to his guilt, but to his mitigation; the very emphasis placed in modern penal policy upon the desirability of non-custodial disposals designed to be remedial rather than retributive,*

> *especially in the case of young offenders, offers powerful support for the view that delinquents under the age of 14, who may know no better than to commit anti-social and sometimes dangerous crimes, should not be held immune from the criminal justice system, but sensibly managed within it. Otherwise they are left outside the law, free to commit further crime, perhaps of increasing gravity, unchecked by the courts whose very duty it is to bring them to book.*"

As explained in Lord Lowry's speech when the case reached the House of Lords (at page 37), "*It is quite clear that, as the law stands, the Crown must, as part of the prosecution's case, show that a child defendant is doli capax before that child can have a case to meet*". The consequences had been spelt out by Laws LJ (at page 9):

> "*It means that a child over ten who commits an act of obvious dishonesty, or even grave violence, is to be acquitted unless the prosecution specifically prove by discrete evidence that he understands the obliquity of what he is doing. It is unreal and contrary to common sense …*".

As already indicated, Parliament intervened and abolished the defence and presumption. Accordingly, there is no longer any need in England and Wales for the Crown to adduce evidence against a defendant of the age the Appellant was at the material time to rebut such a presumption.

18. The position in Guernsey has best been described as "*unsettled*", a word used both in evidence to the Commissioners in the mid-19th century and in a 1966 Policy Letter.

19. At paragraphs 5401 to 5416 of the Report of the Royal Commission appointed to enquire into the criminal laws of the Channel Islands 1846-8 there is an exchange about the age of criminal responsibility. Advocate Tupper agreed that it was "*quite unsettled*" (para. 5401), although the Bailiff clarified that this answer referred to the position of those of "*the age before puberty*" (para. 5402). There existed at the time an assumption that girls older than 12 and boys older than 14 were responsible to the law (para. 5403). The Bailiff suggested there was a presumption "*against the criminality of a person under the age of puberty*" (para. 5406) and the witnesses related some cases of which they were aware, including one in which a boy of 11 had been indicted, overruling an objection on his behalf that it was impossible to put him to trial "*au Grand Criminel*". The parting comment on this topic from the Bailiff was "*I think it would be very desirable to adopt the English rule of law*".

20. I accept the submission of Crown Advocate Russell that the inference to draw from that comment of the Bailiff is that the English law doctrine of *doli incapax* was not recognised in the mid-19th century as forming part of Guernsey law. If the doctrine had been acknowledged by the eminent people giving evidence to the Commissioners as existing, this exchange would have been quite different.

21. By 1966, the position appeared to remain the same. The second paragraph of section 8 of the Policy Letter leading to the enactment of the Children and Young Persons (Guernsey) Law, 1967 (see page 89 of the Billet d'Etat) states:

> "*The Law in Guernsey as respects the minimum age of criminal responsibility has never been statutorily determined and is wholly governed by customary law. The customary law, however, is unsettled in this respect. Her Majesty's Procureur has informed the Board that as a matter of practice and in line with the law of England criminal proceedings are not now taken against children under the age of ten years. He has advised the Board, and the Board agrees, that statutory provision should be made along the lines of the English legislation to the intent that it should be conclusively presumed that no child under the age of ten years can be guilty of an offence. If local legislation is introduced, as previously suggested, along the lines of the provisions of the Act of 1963 relating to children in need of care, protection or control, it will be possible under that*

> *legislation to deal with a child under the age of ten years who commits, for example, an act of theft as a child in need of care, protection or control if the circumstances justify the taking of steps to deal with him in that way.*"

Section 15 of the 1967 Law provided "*It shall be conclusively presumed that no child under the age of ten years can be guilty of an offence*".

22. Section 3 of the 2008 Law re-enacts section 15, but with "*twelve*" substituted for "*ten*". Unlike the 1998 Act, there was no reference at all to the doctrine of *doli incapax*. There was also no such reference in the Policy Letter, which (at page 1803 of the Billet d'Etat) stated:

> "*In Guernsey, the age of criminal responsibility is 10. As set out in the consultation document, "Youth Justice in the Bailiwick of Guernsey", this is at the lower end of the scale internationally, with countries in recent years tending to revise this age upwards. The HSSD proposes that the age of criminal responsibility be raised to 12. This reflects the proposed statutory age at which the new Law presumes children to be able to form opinions of their own and by implication have an understanding of the consequences of their actions. (See guiding principle 5, on page 9 above.)*"

The fifth guiding principle (see page 1783 of the Billet d'Etat) stated that "*It is presumed that from the age of 12 children are capable of forming a considered and rational view. This presumption may be challenged in individual cases.*" Although that guiding principle appears to be of general application and is not specifically addressing the position of children and the criminal law, the underlying legislative intention seems to me to do no more than raise the age of criminal responsibility from 10 to 12, thereby reflecting international trends, whilst leaving how to deal with someone above that age unaffected. As mentioned in the 1966 Policy Letter, for children below the age of criminal responsibility, their actions, including criminal offending, can be dealt with through the Office of Children's Convenor in the same way as other situations where a child is in need or at risk.

23. From all this material, I am satisfied that the doctrine of *doli incapax* has not been clearly incorporated into Guernsey law at any time. I am comforted that the same conclusion has been reached in respect of Jersey law (see *Attorney General v W* [2008] JLR Note 6). The legislature has intervened in the last 50 or so years to prescribe only the age below which a child does not have criminal responsibility. From 4 January 2010, that age has been 12. All three offences for which the Appellant was convicted concerned dates after his 12th birthday but before his 14th birthday. Because the doctrine of *doli incapax* did not apply at the time of his trial, it was not incumbent on the prosecution to rebut any presumption against him having criminal responsibility, in the sense of needing to prove by discrete evidence that he had knowledge that what he was doing was wrong.

Capacity

24. That conclusion in relation to *doli incapax* still leaves open the question of the Appellant's capacity to commit the offences charged at each of the material times. Insofar as the Juvenile Court decided that it entertained "*no doubt as to his capacity inasmuch as that is an issue*" (page 196, transcript), the Appellant needs to persuade this Court that such a factual finding was "*obviously and palpably wrong*".

25. Advocate Merrien's submissions concentrated on the Appellant's demeanor at trial, which took place, as he noted, some 11 months after the latest date in the final period covered by the charges. He accepted that the Judge also referred to the Appellant's evidence in interview, but he commented that this was only with the benefit of the transcript and that the Judge did not know how the Appellant had presented during those interviews. Even then, the interviews took place immediately following the allegations made at the end of the period covered by the charges and so was up to 18 months after the earliest date in the first charge. Advocate Merrien referred to the natural process of maturing over this period of time and that the evidence of the Appellant's capacity at each period covered by the three distinct charging periods had simply not been established, as required. In his closing speech at the trial,

Advocate Merrien had highlighted that the Appellant had been assessed in 2011 as being in the lowest percentile of the Wechsler Intelligence Scale for Children and that his ability to understand what was going on had been an issue for the police officer who gave evidence.

26. Crown Advocate Russell dealt with capacity slightly differently. Once the Court accepted, as it has, that the *doli incapax* presumption is not in issue, the Court merely needs to look at the offence charged and consider how any alleged incapacity has an impact on the elements of that offence. Here, the allegations against the Appellant were allegations of assaults committed in clear circumstances of indecency, meaning that the prosecution had been required to prove to the criminal standard a basic intention to commit the assault on the victim. The Appellant's defence had been one of complete denial that he had done anything to the complainant; there had been no suggestion that the touching alleged had inadvertently taken place. Accordingly, given the nature of the defence and the totality of the evidence against the Appellant, the Juvenile Court could be satisfied, as the Judge clearly was, that the Appellant did not lack the capacity to commit these offences.

27. In my judgment, the findings of the Juvenile Court on capacity were not obviously and palpably wrong. The Judge properly had regard to the evidence given by the Appellant and what he had said in interview. From that evidence, he was entitled to reach the conclusion that the Appellant acted consciously and with awareness of what he was doing. Insofar as there was any presumption to be challenged, this was not a presumption to be rebutted by the prosecution but rather a presumption that the Appellant was criminally responsible unless it was shown that he lacked the capacity required to commit the offence charged. If the evidence of the Appellant being the perpetrator was accepted, there was ample evidence to demonstrate that the Appellant acted with the requisite *mens rea*. This was not a case where distinguishing between right and wrong, or that the Appellant understood the criminal consequences of what he was doing, mattered. As the Judge said:

> "*The charges in this case are samples, not specific averments, so the evidence is the same to assess for each. They therefore stand or fall together in this case. If the evidence of the Complainant is true, then the elements of the offences are made out in law.*"

In the light of that analysis, this is not a case where this Court would be justified in interfering with the conclusions of the Juvenile Court.

28. If, contrary to my conclusion, the *doli incapax* doctrine had been relevant, then there might have been some merit in Advocate Merrien's submissions that extrapolating from the trial and interview evidence back to the earlier periods covered by the charges required some reference to further evidence covering those periods satisfying the Court that the presumption against criminal responsibility had been rebutted. If so, I would probably have been minded to remit the case to the Juvenile Court pursuant to the power in section 6(1)(b) of the 1988 Law as the most appropriate disposal of at least part of the appeal. I am, however, satisfied that the conclusions on the questions of capacity aired on behalf of the Appellant were the correct conclusions in all the circumstances of the case, including the manner in which the Appellant's case had been presented. Accordingly, this first ground of appeal is rejected.

Rationality of decision on evidence

29. In his written and oral submissions, Advocate Merrien has drawn attention to a number of inconsistencies in the evidence given by the young complainant. They were broadly summarised into the following issues: the number of occasions on which it is alleged there were indecent assaults; the type of activity and the progression of events; the opportunity that existed to perpetrate these assaults; the location at which they occurred, in particular the presence or absence of bunk beds at the Appellant's home; and various other less readily classifiable inconsistencies.

30. The Judge was alive to the question of discrepancies in the evidence. I consider that I can properly take into account that the Judge is very experienced and so is familiar with the necessary principles to bear in mind to take care when considering the evidence of young and other vulnerable witnesses. Having started with the unchallenged evidence resulting from the medical examination of the complainant, he highlighted certain aspects of the evidence that resonated with him as being consistent with that medical evidence and continued (at page 195C, transcript):

> "*The discrepancies between the Complainant's evidence and her interviews with the police were rightly referred to by Advocate Merrien. As anyone with experience of young children, whether in Court or not knows, a year for a little girl of this age is an enormously long time.*
> *The question is whether the discrepancies that and elsewhere materially affect my view of her veracity. I expect a number of discrepancies in an account given by a very young witness, especially in this type of case. They are minimal generally only when the witness is keeping to a script they have learnt. Times and dates simply do not register with children of this age.*"

Despite the discrepancies, the Judge concluded that he believed the complainant and disbelieved the Appellant, who he found had told lies about matters given in evidence by other witnesses.

31. The question is whether the Juvenile Court's conclusion on the evidence, and so the verdicts of guilty, are sustainable, bearing in mind the high hurdle the Appellant needs to surmount in this regard.

32. Because of the nature of the allegations and findings, I have given anxious consideration to all of the evidence. I repeat that I only have the benefit of the typed words on the pages of the transcript and did not see the complainant or the Appellant give evidence. The impression gleaned from all the words used by the complainant is not of someone who has been coached by another person in what to say and is sticking to her "*script*". There seem to be real elements of spontaneity in what she said, eg, suddenly describing the Appellant's breathing as "*like a happy dog*" (page 77, transcript). Her evidence does not read as being that of someone carefully constructing an invented version of events, in spite of some material covered relating to what appears to be a vivid imagination (eg, the invisible book and glasses referred to in interview). Further, I also bear in mind that, unlike other witnesses who frequently have the benefit of refreshing their memories by reading the witness statements they have made, the complainant had only been video-interviewed and so would not have he that opportunity.

33. The questioning of the complainant, and also that of the Appellant, by both Counsel and the Judge clearly proceeded in a sensitive and careful manner. Each of them is to be commended for that. The number of occasions on which the Appellant assaulted the complainant was covered several times during the latter's evidence. Her evidence clearly relates to repeated assaults. Applying a strict mathematical approach to what the complainant said would result in there being obvious discrepancies. Although Advocate Merrien submits that the inconsistencies about the number of incidents were so serious that they could not be disregarded, the Judge did not take the figures mentioned at face value. That is, in my view, understandable. This was not a victim meticulously logging each incident for future reference. As the Juvenile Court found, the whole tenor of the evidence was not of occasional assaults, ie, isolated incidents occurring infrequently where one might expect more particular recall of each, but of a prolonged course of conduct where events have rather merged in the complainant's mind into what she then described. I note in particular the answer on page 72 of the transcript: "H was doing them for a year and a half and I don't know what that, how to add that all up". Another way of reviewing her evidence is to consider whether, if this were total fabrication, as alleged by the Appellant, she would have invented multiple incidents apparently taking place weekly, which would be much harder to sustain than a story about a number of more clearly described specific occasions. The Judge's decision not to place too much weight

on the discrepancies about the number of incidents is not, in my view, such as to make his conclusions that the Appellant committed the specimen offences over a period of time obviously and palpably wrong.

34. Similar comments can be made in relation to the type of activity in which the Appellant engaged and the time at which the complainant sought to tell others about it. As I have just stated, there was no suggestion that the complainant could clearly describe each separate incident in sufficient detail so as to distinguish between them. The impression formed is of someone who knows that something horrible happened during a period of her short life and proceeds rather to conflate various elements into a course of conduct (see, eg, the answer on page 62 of the transcript: "*... and then just kept on repeating. [Sigh]"*). In answering the questions put to her, the complainant appears to be seeking to extract certain specific answers from such a collective memory of events. Given the age of the complainant, it is perhaps not unsurprising that Advocate Merrien is able to point to a series of specific inconsistencies now. Of course, the Judge acknowledged that there were discrepancies on detail (see, eg, the top of page 195 of the transcript).

35. The suggestion is that the complainant's account of when the Appellant did what and when means that she must have told, or attempted to tell, her respective parents very early on during the time period covered, which is known not to have been the case. Once she informed her mother at the end of the 18-month period, steps were taken to prevent the complainant and the Appellant seeing each other. It had to be acknowledged that a number of the answers given to specific questions put mean that it is unclear exactly what happened when. Again, however, despite careful cross-examination by Advocate Merrien, the complainant was not shaken from her evidence that it was the Appellant who had done all these things to her on numerous occasions over a lengthy period of time. She had distinct recollections of some of it being more painful than others and of what she felt and did as a result. As the Judge commented, it all had "*a ring of truth*". Any inconsistencies in respect of these matters are not, in my view, such as to make the decision of the Juvenile Court obviously and palpably wrong.

36. The issue of opportunity raised on behalf of the Appellant is similarly inter-related. If the number of incidents really was as frequent as the complainant said, putting it at its highest, then it is doubtful, although not necessarily impossible, that the opportunity existed for the Appellant to assault the complainant that number of times during the times they were in each other's company each week. However, once one looks behind the exact figures, as I have concluded the Judge was entitled to do, and approaches the complainant's evidence on the basis that it represents an extremely regular course of conduct of abuse, it is apparent that there were plenty of occasions when the complainant and the Appellant were not directly supervised by a third party, meaning that there was ample opportunity for these assaults to take place in such a regular manner over the period in question. Accordingly, this is a further aspect where the Appellant has failed to persuade me that the decision of the Judge was obviously and palpably wrong.

37. The final specific area of inconsistency to which Advocate Merrien has referred is the evidence about references to the assaults taking place on a bunk bed, when other evidence strongly indicated that neither the complainant nor the Appellant had a bunk bed at the Appellant's home during the relevant period. As the complainant said in cross-examination (see page 63, transcript), when referring to bunk beds in her interview, "*I made a mistake at the police*". The evidence she gave to the Juvenile Court was that the assaults on her took place upstairs at the Appellant's home where there were no bunk beds. Whilst this account differed from some of what she had told the police in interview, I consider that the Judge was entitled to accept that this mistake did not affect the complainant's reliability and credibility.

38. Taking the complainant's evidence as a whole, and looking at it in the light of all the other evidence tendered on behalf of the prosecution and the defence, the Judge could, in my judgment, properly overlook these and the other discrepancies mentioned by Advocate Merrien on behalf of the Appellant; he reached factual findings that he was entitled to reach.

39. As I have already said, I have given very careful consideration to the submissions made by Advocate Merrien on the Juvenile Court's factual findings. In doing so, I have read and re-read the transcript and the other evidence given at the trial. I cannot conclude that the Judge's decision that the complainant was repeatedly assaulted by the Appellant can be dismissed as unsustainable. Indeed, subject to the caveat that I have not had the benefit of seeing the witnesses give their evidence, the words on the page are clearly suggestive of the complainant's account being eminently capable of belief. As set out above, Advocate Merrien can quite legitimately point to a number of inconsistencies in the complainant's evidence. Those inconsistencies were acknowledged by the Judge and commented upon, either specifically or generally. In doing so, he demonstrated that he was well aware of their existence, took them into account and still chose to believe the complainant's evidence and disbelieve the Appellant. Whether analysed individually or taken collectively, I cannot say that those inconsistencies or discrepancies in the evidence, when viewed in the light of all the evidence before the Juvenile Court, render the complainant's account incapable of belief. The factual conclusions the Judge reached are not, in my judgment, obviously and palpably wrong. Further, the verdicts of the Juvenile Court are not, in my view unreasonable nor do I find that there has been any miscarriage of justice.

Outcome

40. For the reasons given, the Appellant's appeal against conviction in respect of the three charges of indecent assault is hereby dismissed. Because there has been no appeal against sentence, the Supervision Order in respect of those convictions stands.

Richard J McMahon
16th September 2013