Leave to appeal the conviction of vaginal rape, contrary to section 11 of the Sexual Offences (Bailiwick of Guernsey) Law 2020; sexual assault contrary to section 13 of the 2020 Law and common assault.

[2024]GCA028

IN THE COURT OF APPEAL OF GUERNSEY

CRIMINAL DIVISION

Civil Appeal No:518

Before:	**Jonathan Crow CVO, KC** **David Perry KC** **Sir Adrian Fulford PC**	
Between:	**D2**	**Appellant**
	-and-	
	THE LAW OFFICERS OF THE CROWN	**Respondent**

Advocate S Maindonald for the Appellant
Advocate J McVeigh for the Respondent

JUDGMENT

Fulford JA

The Background

1. The Appellant, (D2), was convicted on 4 September 2023 of vaginal rape, contrary to section 11 of the Sexual Offences (Bailiwick of Guernsey) Law 2020 ("2020 Law") (count 6); sexual assault contrary to section 13 of the 2020 Law (count 8); and common assault (count 9). His co-accused, D1, was convicted on the same day of vaginal rape, contrary to section 11 of the 2020 Law, (count 1); sexual touching of a child by penetration, contrary to section 21 of the 2020 Law (count 2); oral rape, contrary to section 11 of the 2020 Law, (count 3); assault by digital penetration contrary to section 12 of the 2020 Law, (count 4); and common assault (count 5). A striking feature of the case is that the victim, C, D2 and D1 were all 14 years of age at the time of these offences.

2. D2 seeks to appeal his conviction on count 6 on the ground of evidential sufficiency (Ground 1) and his convictions on counts 6 and 8 on the basis that the Jurats were misdirected as regards both "the statutory evidential presumptions" and the issue of consent (Ground 2). On 23 February 2024, the Bailiff, Sir Richard McMahon, decided that the Appellant had a right of appeal without leave as regards Ground 2, given section 24(1)(a) of the Court of Appeal (Guernsey) Law 1961 provides there is an appeal as of right against conviction in the Royal Court "on any ground of appeal which involves a question of law alone". The Bailiff referred the application for leave as regards Ground 1 to the plenary court.

The Facts

3. C had known most of her life, they both having attended the same primary and secondary school. She got to know D1 at their secondary school, and as of the date of these offences on 11 July 2022, C and D1 had been boyfriend and girlfriend for a few weeks. Any physical intimacy had previously been confined to kissing and cuddling.

4. Prior to their arrival at C's house on 11 July 2020, D2 told C that he and D1 had bought "loads of drinks" and there had been a text message between D1 and D2 suggesting that D1 and C were going to have sexual intercourse. In due course the three left C's house on foot and they stopped at a secluded field. C recalled they were drinking from two bottles. A bottle of Captain Morgan rum and Bombay Sapphire gin were found at the scene which matched C's description. C, feeling the effect of the alcohol she had consumed, laid down. Shortly afterwards, the unlawful activity commenced when, on C's account, D2 grabbed her around the throat. Given the focus of the two Grounds of Appeal, it is unnecessary to set out the entirety of the detail of C's account of the circumstances of the multiple offences that then ensued. It is sufficient to rehearse that she set out in her ABE interview that, whilst she was clearly resisting, D2 and D1 raped her vaginally (count 6 for D2). Of particular relevance to the first Ground of Appeal, C's evidence from her ABE interview was that when D2 put his penis inside her (after D1 had raped her) it felt "a bit different" from D1's penis given it was not "rock solid". Furthermore, D1 tried to put his head in the area of her vagina when D2 withdrew his penis. Neither D2 nor D1 ejaculated. C said in oral evidence that she was sure that "both boys" had sex with her, which the prosecution submitted, on a common-sense view, referred to sexual intercourse. According to C, D2 did not attempt oral rape but he touched the external area of her vagina whilst D1 was penetrating her with two fingers (count 8). D2 had held her arms during D1' rape of her, to stop her from moving.

5. In due course they returned to C's house covered in mud. C's body bore red marks, grazes and bruises. D1 and D2, who were both intoxicated, were shortly afterwards confronted with these allegations and they were arrested. The results of C's medical examination were consistent with her account, in the sense that injuries were noted in the area of her vagina (*e.g.* redness, bruising and swelling). Although we have borne in mind Ms Maindonald's submission that these findings do not necessarily demonstrate any involvement in sexual offending by D2, nonetheless, given the prosecution's medical evidence on this issue, the Jurats would have been entitled to conclude that these were the result of non-consensual sexual intercourse.

The Grounds of Appeal

6. As already rehearsed, there are two Grounds of Appeal.

Ground 1

7. The first Ground of Appeal is that there was insufficient evidence to support a conviction for the offence of rape.

8. In support of this contention, it is highlighted that during re-examination C was asked, in the context of the alleged unlawful intimate contact, where D2 touched her, to which she replied that D2 touched her vagina and her bum, pulled her arms and kissed her neck. It is highlighted on the Appellant's behalf that in her oral evidence C did not repeat the allegation that D2 penetrated her vagina with his penis. The Appellant relies on the evidence of D1 in cross-examination that what occurred was simply sexual activity between him and C, as boyfriend and girlfriend. D1 said he did not see D2's penis at any stage. It is emphasised that following their return from the field, D2 denied to a witness that he had touched C and suggested that D1 had "fingered" her. The Appellant relies on the absence of DNA evidence from the relevant areas of C's body positively linking D2 to these alleged sexual offences, although the Appellant accepts that it cannot be contended that the absence of this evidence in any sense conclusively

proves that D2 did not behave as alleged. At its highest, the absence of forensic evidence was a point that could properly be deployed as one of the submissions to the Jurats, to the effect that they could not be sure that the offence of rape had occurred. In this context we emphasise that the defence expert, Dr Short, did no more than suggest that there was an absence of DNA evidence "that might have been expected to be seen". The Judge directed the Jurats that "in relation to the low vaginal swabs, both (experts) agreed that these do not assist as to whether (D2) had vaginal sex with C". In our judgment this was a wholly appropriate direction which reflected the joint conclusions of the prosecution and the defence experts. The Judge, overall, was careful to identify the limitations of the evidential significance of the expert evidence in relation to DNA.

9. In our judgment, this ground of appeal is without merit. There was clear evidence, as summarised by the Judge and set out above, that D2 raped C. The fact that she did not repeat this allegation when asked in re-examination where D2 "touched" her did not operate to prevent the Jurats from relying on her ABE interview that he had vaginally raped her. This question, asked during her re-examination was, in any event, ambiguous in the sense that the **rape** of C would not necessarily form part of an answer by her to a question as to where she had been **"touched"**, in the context of a multi-faceted sexual attack.

10. The submissions of the Appellant are answered by the guidance given by Lord Lane CJ in the case of *R v Galbraith* (1981) 73 Cr App R 124, namely that when the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness's reliability and where on one possible view of the facts there is evidence on which the jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury. Given C's clear evidence that she had been vaginally raped by D2, the various matters relied on by the Appellant, such as the comments by his co-accused, the statements made by D2 at an early stage to a witness after the incident, C's answer to the question about "touching" and the lack of DNA evidence were all matters that the Jurats needed to assess when deciding whether they were sure the Appellant was guilty of the offence charged in count 6. Similarly, the contradictions in C's account in the ABE interview were quintessentially something for the Jurats to determine. It is necessary to have in mind that C had been clear in her ABE interview, as we have set out above, that D2 had raped C.

11. Finally, we note that although it is not in any sense determinative of this Ground of Appeal, the Appellant did not submit to the Judge at the close of the prosecution's case that there was no case to answer. During the trial, it was accepted on his behalf that there was sufficient evidence for the Jurats to consider.

12. Therefore, we decline to grant leave to appeal on this Ground of Appeal

Ground 2

13. In opening the case to the Jurats, counsel for the prosecution indicated that the presumptions under section 4 of the 2020 Law applied to the issue of consent. Under section 4 (to the extent relevant), if it was proved that D2 had intercourse with C or sexually assaulted her, and if i) violence had been used against her (or another person) or she had been in fear of violence being used against her (or another person), or ii) she was unlawfully detained at the time, or iii) she was asleep or unconscious at the time of the rape or sexual assault, C would be taken not to have consented and D2 would not be taken not to have reasonably believed C consented unless sufficient evidence was adduced to raise an issue that D2 believed there had been consent.

14. Prosecuting counsel relied on the violence used and the quantity of alcohol C had consumed, with the suggested consequence that she was incapable of giving consent. Prosecuting counsel, however, then indicated the distinction between the two accused as regards the application of

this provision in that, at the time of the opening, it was only suggested that there had been consensual oral sex between D1

15. and C. D2's account in interview had been that there had been no sexual activity between him and C, consensual or otherwise.

16. Following the opening, the appellant's case remained consistent throughout these proceedings, namely that there had been no sexual activity between him and C. As a consequence, on count 6 (rape) the Judge directed the Jurats as follows:

> *"We then turn to the Counts in relation to (D2), so Count 6, an allegation of vaginal rape of (C), by (D2), intentionally penetrating her vagina with his penis, that she did not consent and he did not reasonably believe that she consented. There is a difference in your approach to this Count from your approach to the count of vaginal rape in relation to (D1), because (D2) is not asserting that (C) did consent, he is saying that it didn't happen, so if you are sure the (D2) did vaginally penetrate (C), you can be sure that she did not consent and the issue of reasonable belief does not arise."*

17. On count 8 (sexual assault) the Judge directed the Jurats as follows:

> *"Count 8 is an allegation of sexual assault by (D2) of (C) by intentionally touching her genitals with his hand, without her consent and reasonable belief in her consent. In this case there is a definition of 'genitals' which includes the pubic area and we are talking about the vagina in this particular Count, […], so the first element is that the prosecution must prove that he intentionally touched her vagina with his hand and then if you are satisfied that that happened, the prosecution must prove (so) that you are sure that she didn't consent. Again, he is not asserting that she did, so if you are sure that he did touch her vagina, then you can be sure she did not consent and the issue of reasonable belief does not arise."*

18. On the issue of intoxication, the Judge directed the Jurats as follows:

> *"There is no dispute that (C), (D1) and (D2) had been drinking on the 11th July last year. Their respective levels of intoxication are relevant to their ability to recall events accurately. All three of them have, at times, responded to questions by saying they could not remember because they were drunk at the time and they all described feelings of being drunk to varying degrees. You will need to evaluate this evidence and form your own view as to the levels of and relevance of intoxication and (I) will remind you of what each said in my summary of the evidence.*
>
> *(C's) intoxication is relevant, not only to her recollection, but also to the issue of her consent. You will need to assess her level of intoxication, particularly at the point of any sexual activity you find to have occurred. It is the prosecution case that she did not consent to any sexual activity nor was she asked to consent. It is (D1's) case that she did consent to sex and that she initiated the oral sex. If you reject her accounts that the sexual activity was forced on her, the impact of her intoxication on her ability to consent is an issue you will need to consider. If she was so drunk that she (could) not have consented then she was not capable of consenting, but if you decide that, despite what she had to drink, she was capable of consenting, she can consent and you will need to consider whether or not she did consent to the particular activity at that moment. It does not matter that she would or might not have consent had she been sober.*
>
> *[…]*
>
> *(D1's) level of intoxication is relevant to his recollection and specifically relevant to any subjective belief he had that (C) was consenting to any sexual activity where consent is an element of the offence. It is not said that he had drunk so much that he*

could not form the intention to commit the offences, a drunken intention is still an intention and if you are satisfied that he had the required intention at the required time, his intoxication does not provide him with any defence.

[…]

You will also need to assess (D2's) level of intoxication. As with (D1) it is not said that he had drunk so much that he could not form the intention to commit the offences; (a) drunken intention is still an intention and if you are satisfied that he had the required intention at the required time, his intoxication doesn't provide him with any defence."

19. It is submitted that these directions were inadequate and that the Jurats may have been misled as to the "evidential presumptions" and that the Judge's observations to the Jurats were a "complicated hybrid". We disagree. It was critical that the Judge distinguished between the positions of D2 and D1, given they were, to an important extent, advancing different defences. As already set out, prosecuting counsel during her opening speech referred the Jurats to the provisions of section 4 of the 2020 Law, whilst expressly making it clear that the issue in relation to the evidential presumptions only applied to D1 since in D2's case the issue of consent simply did not arise. That remained the position throughout the trial: consent did not emerge at any stage as an issue for D2 and it was no part of his case that if the jury believed C, and therefore disbelieved him, that he would then be arguing that notwithstanding the violence, the unlawful detention and C's unconsciousness, she nonetheless still consented. The Judge correctly directed the Jurats, therefore, that consent was not a live issue in D2's case and her directions on this issue – indeed, throughout the summing up – were commendably clear and accurate. There was no risk that the Jurats would have been confused by the reference in prosecuting counsel's opening to section 4 of the 2020 Law and they were appropriately directed that consent did not arise as an issue in D2's case. As set out in the written directions to the Jurats the Judge stated as regards count 6:

"First (the prosecution) must prove that D2 penetrated C's vagina with his penis. She says that he did and he says that there was no sexual contact. Secondly (the prosecution) must prove so that you are sure that C did not consent to the penetration. D2 is not asserting that she did consent so if you are sure that D2 did vaginally penetrate her you can be sure that she did not consent and the issue of reasonable belief does not arise."

20. There was a similar approach to consent taken on the direction on count 8.

21. It follows that it was at all stages clearly explained to the Jurats that consent was not an issue in D2's case and it was equally clear that the provisions of section 4 of the 2020 Law only had potential relevance in the trial in relation to the case of D1. As regards D2 there was no misdirection or risk of confusion on the basis that the Jurat's were presented with a complicated hybrid. To the contrary: the Judge's directions, agreed by the advocates in advance of the summing up, were a model of clarity and accuracy as to how they should approach the issue of consent in D2's case.

22. Therefore, we refuse to grant leave to appeal on Ground 1 and we dismiss the appeal on Ground 2.