



CASE NO SC/CRIM/02/17

IN THE SUPREME COURT OF THE FALKLAND ISLANDS

Courts and Tribunal Service
Town Hall
Ross Road
Stanley
Falkland Islands

Date: 15 July 2017

Before:

HER HONOUR JUDGE MARTINE KUSHNER, ACTING JUDGE OF THE SUPREME COURT

R v Jordan Benjamin ALFRED

Sarah Lindop and Ian Martin for the Defendant
Joseph Hart and Stuart Walker for the Crown

TRANSCRIPT OF THE DIRECTIONS, JUDGMENT AND DECISION OF THE ACTING JUDGE

TRANSCRIPT APPROVED BY THE ACTING JUDGE

THE ACTING JUDGE:

1. On the night of the 12th February it's alleged by the Prosecution that the Defendant along with his friend followed ZZ home, pushed his way into the home uninvited and proceeded to try and force her to have oral sex. The Defence say that nothing of the sort happened, that he was invited back into her home and there was no sexual contact or activity at all. Those then are the respective positions of the Prosecution and the Defence in relation to the alleged events giving rise to the charges the Defendant faces.
2. In this case the Defendant has chosen to be tried by judge alone, and not by judge and jury, so the functions of giving directions of law and making findings based on the evidence are wholly mine. I intend to state the directions of law and also directions as to how I should approach consideration of the evidence.

The burden and standard of proof

3. It is for the Prosecution to prove that this defendant is guilty. The Defendant does not have to prove his innocence. In a criminal trial the burden of proving the Defendant's guilt is all on the Prosecution alone. How does the Prosecution succeed in proving the Defendant's guilt? The answer is by making me sure of it. Nothing less than that will do. If after considering all the evidence, I'm sure the Defendant is guilty in relation to a particular count with which he is charged, I must return a verdict of 'Guilty'. If I'm not sure, my verdict on that count must be 'Not Guilty'.
4. I must decide this case only on the evidence which has been placed before me. There will be no more. I'm entitled to draw inferences, that is, to come to common sense conclusions based on the evidence which I accept, but I may not speculate about what evidence there might have been or allow myself to be drawn into speculation.
5. I don't have to decide every point which has been raised; only such matters as will enable me to say whether the charges laid against this Defendant have been proven. I'll do that by having regard to the whole of the evidence and forming my own judgement about the witnesses and which evidence is reliable and which is not.
6. Allegations of attempted rape and sexual assault are emotional matters. However, I should and will put emotion to one side and judge the case fairly on the evidence I've heard in court. During the course of the trial the Defendant chose to give evidence. He wasn't obliged to do so. I must judge that evidence by precisely the fair standards as I apply to any other evidence in the case.
7. ZZ gave evidence from behind a screen. The giving of evidence in this way is perfectly normal in these sort of cases. It's designed to enable the witness to be more at ease when giving evidence. It is not intended to pre-judge the evidence which the witness gives and does not reflect at all on the defendant or his defence. The fact that the evidence has been given in this way must not in any way be considered as prejudicial to the accused and her evidence should be treated like any other evidence in the case giving it such weight as I think fit.
8. The same is true of the evidence heard from Live Television Link from abroad. Both by PC McPhee and Mr Treadwell, it's simply a convenient way for evidence to be given. I should treat that evidence like any other in the case giving it such weight as I think fit.

9. I heard speeches from both sides and I may wish to take account of the arguments in the speeches I have heard. I have to say they have been helpful from both sides, but I am not bound to accept them. Counsel and Solicitor for each of the parties obviously ask me to look at the case from their respective angles. But evidence is what I've heard from the witness box not from Counsel, not from their questions. It's from what I heard from the witness box or what was read, or the facts that have been agreed.
10. Character. I've heard that the Defendant is a man of good character in the sense he has no criminal convictions, cautions or reprimands against him. I've also heard evidence of his character, a character reference. Of course, good character cannot by itself provide a defence to a criminal charge but it is evidence which I should take into account in his favour in the following way:
11. In the first place the Defendant has given evidence and as with any man of good character it supports his credibility. This means that it is a factor that I should take into account when deciding whether I believe his evidence. In the second place the fact that he is of good character may mean that he is less likely than otherwise might be the case to commit these offences. I've said these are matters to which I should have regard in the Defendant's behaviour. It is for me to decide what weight I should give them in this case. In doing so, I am entitled to take into account everything I've heard about the defendant.
12. YY gave evidence that on the 12th of February ZZ told her that she had been attacked in her home. I'm not going to go into more detail about precisely what was said at this stage but I will go into more detail when I consider the evidence more particularly. But at this stage I direct myself that I can take account of this when I'm deciding whether ZZ's allegation is true. But I direct myself that the evidence of YY is not independent evidence about what happened between ZZ and the Defendant. This is because it is only evidence about what ZZ told her sister about what happened between ZZ and Mr Alfred. YY was not there and so didn't see what did or did not happen.
13. The reason why I have heard what ZZ said to her sister YY, is so that I can consider it in deciding whether or not ZZ has been consistent in what she has alleged and whether or not she has told the truth. And when deciding this I should consider, inter alia, for example, the timescale between the alleged incident and what she said at the time of the statement to her sister; whether ZZ had time to make up the complaint; the context of what she said to her sister; how the version of events unfolded and whether there is any consistency or inconsistency in what she said.
14. There are previous inconsistent statements and that means there are occasions when what the witness said in the past is something different from what they have said within the witness box and, in the case of the complainant, what she said in the witness box, in itself being inconsistent with other things that she said in the witness box. It's common ground that there are those inconsistencies.
15. I'll have to consider those early statements and consider how it affects the credibility of that witness and whether or not it undermines her. Essentially I have to decide whether the Prosecution has proven so that I am sure that the substance of the charge has been made out.
16. I shall be directing myself about the ingredients of each count in due course. In this indictment the counts are put in the alternative. The defendant has been charged with two counts. I'll go through the route map in a minute. But on Count 1 he is charged with attempted rape, on Count 2, he is charged with sexual assault, which is a less serious offence.

The important point here is that the Defendant cannot be found guilty of both counts because they are alternative charges.

17. I must consider Count 1 first and if I my verdict on Count 1 is 'Guilty', that is the end of my deliberation and I will not consider Count 2 or return any verdict on it. However, if I am not sure that the Defendant is guilty of Count 1 then I will return a verdict of 'Not Guilty' and then go on to consider Count 2.
18. So I look at the route map and I look at the indictment and how I should consider the charges.
19. There are two counts, two offences on the indictment and particulars or details of each of those offences. Subject to what I have just said about accounts being alternatives I must consider the case against and for the defendant on each count separately. The important obligation is to consider each count separately on its merits. This does not mean that I should ignore all the evidence of background circumstances. Nevertheless if I go to consider Count 2, I must reach a separate verdict on this count having focused on this count separately and having formed a separate decision about it.
20. There are a number of issues of law which arise in relation to these offences and to assist there is a prepared document. I am grateful to Mr Hart and consider it has been agreed by Miss Lindop. It is commonly called a route to verdict. In other words it tells me the various questions I have to ask myself, what steps to take and I'll go through this to direct myself in relation to each account.
21. So, on the element that the element of the offence Count 1, the statement of the offence is Attempted Rape contrary to section 1 subsection 1 of the Criminal Attempts Act and its application to the Falkland Islands, by virtue of section 6 of and schedule 1 part 1 to the Crimes Ordinance 1989.
22. The particulars of the offence are these: Jordan Benjamin Alfred on the 12th of February 2017 attempted to intentionally penetrate the mouth of ZZ with his penis, and the said ZZ not consenting to the penetration, and the said Jordan Benjamin Alfred not reasonably believing that ZZ consented. And you should note an attempt is when a Defendant does something more than merely preparatory towards the commission of an offence. For example, an example given by Mr Hart which I adopt, to bake a cake one must gather the ingredients. Arguably that is preparatory. Once the eggs are broken, arguably one has gone beyond merely preparing and has begun to attempt to bake a cake.
23. So the root is this, have the Prosecution made me sure that Mr Alfred tried to place his penis in the mouth of ZZ, penetration. If it's 'no', then it's 'Not Guilty' on this count. If it's 'yes', I go to question 2. Am I sure that the penetration was intentional? In other words, did Mr Alfred mean to try to place his penis in the mouth of ZZ, rather than by for example, accident. If the answer is 'no', it's 'Not Guilty' on this count, if it is 'yes', I go to question 3.
24. Consent is not an issue in this case and the answer to both questions 3 and 4 is 'yes'.
25. Are you sure that ZZ did not consent to the penetration? If the answer is 'no', he's not guilty on this count, if it is 'yes' I go to question 4.

26. Are you sure that Mr Alfred did not reasonably believe that ZZ consented to the penetration? If the answer is 'no', he's not guilty on this count; if it 'yes', it's guilty on this count. But if it is 'Not Guilty' on Count 1, consideration then moves on to Count 2. On Count 2, the statement of the offence is this:
27. Sexual assault, contrary to Section 3(1) of the Sexual Offences Act 2003 in its application to the Falkland Islands by virtue of section 2 and the schedule to the Sexual Offences Ordinance 2005.
28. And the particulars of the offence are these; Jordan Benjamin Alfred, on the 12th day of February 2017 intentionally touched ZZ and the touching was sexual; ZZ did not consent to the touching and Jordan Alfred did not believe that ZZ consented.
29. So I move on to the questions, have the Prosecution made me sure that Jordan Benjamin Alfred touched ZZ in all or any of the ways alleged on an occasion other than Count 1? If the answer is 'no', then it's 'Not Guilty' on this count but if 'Yes' I go to question two.
30. Am I sure that the touching was sexual? And touching can be obviously sexual, or it may be an act that could be sexual depending on the circumstances or the intentions of the defendant. If the answer is 'no', it's 'Not Guilty' on this count, if it is 'yes', I go to question three.
31. Question three, am I sure that the touching was deliberate? If the answer is 'no', it's 'Not Guilty' on this count, if it's 'yes', I go to question four.
32. Consent is not an issue in this case and the answer to both question four and five is yes, if you're sure that ZZ did not consent to being touched sexually? If the answer is 'no', it's 'Not Guilty' on this count, if it's yes, go to question five.
33. Are you sure that Mr Alfred did not reasonably and honestly believe that ZZ consented to being touched sexually? If it's 'no', it's 'Not Guilty' on this count, if it's 'yes', then it's 'Guilty' on count 2.
34. Now I touched on the fact that this is a case where there was sexual allegations and serious because of that. There is a risk of jumping to conclusions or making assumptions based on stereotypes in this sort of case and the experience of judges who try sexual offences is that there is an image of a stereotypical behaviour and demeanour by a victim or the perpetrator of a non-consensual offence such as rape held by some members of the public which can be misleading and capable of leading to injustice.
35. That experience has been gained by judges, expert in the field, presiding over many such trials during which guilt has been established but in which the behaviour and demeanour of complainants and defendants, both during the incident giving rise to the charge and in evidence, has been widely variable. Judges, have, as a result of their experience, in recent years adopted the course of cautioning juries against applying stereotypical images of how an alleged victim or an alleged perpetrator of a sexual offence ought to have behaved at the time, or ought to appear while giving evidence, and to judge the evidence on its intrinsic merits. This is not to invite juries to suspend their own judgement but to approach the evidence without prejudice.

36. Now we have no jury in this case but I give that same direction to myself. So, for example, what has been raised by both sides are inconsistent accounts. So when I come to consider whether or not this allegation is true, I must avoid making an assumption that, because the complainant has said something different to someone else that evidence is untrue. I've heard that when ZZ gave a statement to the Police that she gave a different account from that which she gave in the witness box. Similarly there is, it has been raised, that what she said to her sister was also different. There is no issue that these two accounts are inconsistent with one another and I have to consider why this is so. I have to compare these accounts and if I find that they are inconsistent I'll have to consider why. The mere fact that the complainant has not been consistent in the accounts that she has given, does not necessarily mean that her evidence is not true. Experience has shown that inconsistencies in accounts can arise whether a person is telling the truth or not. This is because the memory of somebody who has had an experience of the kind complained of in this case may be effected by it in different ways and this may also have a bearing on that person's ability in taking it in, register, and recall it. Also, after such an event some people may go over and over it in their minds with the result that their memory may become clearer. Whilst other people will try to avoid thinking about it and consequently, whilst the incident did occur they may have difficulty in recalling it accurately.
37. I mention these points so that I can think about them. I am not expressing any opinion about it at this stage. It's for me to decide whether or not the complainant's evidence is true. To answer this question I must look at all the evidence including any inconsistencies which I find exist and decide what effect these have on the complainant's truthfulness. If I am sure that the complainant's account is true then I am entitled to rely on it. If I am not sure that it is true, or I am sure that it is untrue, then I can't rely on it.
38. Equally it has also been said by the Prosecution that her account is consistent and I have been asked to find that the complainant's account is true because she is being consistent on the main thrust, if I can put it like that, of what she has said to, for example, her sister, to the Police and in the witness box. The mere fact that a person gives a consistent account about that event does not necessarily mean that account must be true, any more than the fact that a person who gives an inconsistent account must mean that the event did not happen.
39. So, in deciding whether or not the complainant's account is true I should look at all the evidence. And if having done so I am sure that the complainant's account is true then I am entitled to rely on it. If I am not so sure that it is true or that it is untrue, then I can't rely on it.
40. Again, there has been evidence about the emotion of when the complainant made the complaint to her sister and there are a number of points when in her evidence, it was alleged that she became distressed and emotional. It's entirely for me to decide whether or not her evidence is true but I can't simply assume that because she showed distress and emotion that it must be true. It's perfectly possible for a witness to become distressed and emotional when describing an incident to somebody, whether or not their account is true. The presence or absence of a show of emotional distress when giving evidence is not a reliable pointer to truthfulness or untruthfulness of what a person is saying.
41. Now, again, emotion has been expressed within the witness box, it may well be that she became stressed. It may well be that I will view that her evidence was flat and calm and that she gave her account in a matter of fact way without showing any emotion. I may take the view that it was variable. Again it is entirely for me to decide what I should make of her evidence. But it would be wrong to assume that the manner in which she appeared to give evidence is an indication whether or not it is true. This is because experience has shown that

people react to situations and cope with them in different ways. Some people who have experienced an incident of the kind complained of in this case, when they have to speak about it, show obvious signs of emotion and distress. Whereas, others show no emotion at all. Consequently the presence or absence of a show of emotion or distress when giving evidence is not a reliable pointer to the truthfulness or untruthfulness of what a person is saying.

42. And can I add this. It is also true of Mr Alfred when he gave evidence because at times, he too was emotional. It is a matter for me how I factor that in, what weight I give it, and how it affects my view of the evidence he was giving, if at all. I remind myself what I said initially, what counsel says...what they asked is not evidence. They've asked questions of witnesses and made speeches to persuade me of their own case and the conclusions they invite me to draw from evidence which I have heard.

43. But it has always been my responsibility to judge the evidence and decide all the relevant facts from the case and when I come to consider my verdict I, and I alone must and will make it.

[The judge retires to consider her verdict]

44. I've already given directions to myself on how I should approach the evidence and how to approach my findings on the facts. One matter I should start off with, for the avoidance of doubt, on the unused material. As I knew there might be an election of a trial by judge alone, I deliberately did not read any of the unused material and still have not read any of the unused material unless and until that material has been produced in evidence within the trial, and only such evidence has been produced. I have still not read the bulk of the unused material.

45. So turning to my judgement, I state that I do not make findings unless I am certain so that I am sure, and although I may not preface every finding with that point, it should be taken that I have found that the prosecution have proven so that I am certain so that I am on sure. It should be taken that where I state I have made findings it is on the basis that the Prosecution have met the burden of proof and have done to the requisite standard.

46. On the 11th of February a group of soldiers came for a night out in town. Two of those soldiers were Jordan Alfred and his friend Mr Treadwell. It was their first time in Stanley, although one of their number of, possibly, a group of eight had been into Stanley before. It was something that Mr Alfred had looked forward to. It was his first time in Stanley, and also he had some difficult and gruelling family difficulties over the Christmas period and beyond from which he was still recovering and still suffering.

47. That night, the group of soldiers checked into the Hillside Camp where they were staying the night, then they went off to go drinking. At various times they went to The Globe and The Narrows, backwards and forwards, ending up at The Narrows as it had an extension of the licence. On the whole the group stayed together. But, at the end of the night the group got into various taxis and Mr Alfred and Mr Treadwell became separated from them. It's not clear where the others were going to and it probably doesn't matter. The defendant and Mr Treadwell were talking to locals in The Narrows' car park and were invited back to the YMCA where one of the locals lived... I think it's Mr Damien Reid. Mr Treadwell contributed some cash for some beer and back they went into the taxi to the YMCA. There is no dispute that the passengers included ZZ, the complainant, the defendant, Mr Treadwell and probably one other, Damian Reid possibly, and maybe a fifth person. It would be a shortish ride to the YMCA.

48. Once at the YMCA the atmosphere was good, beer was available. ZZ said she had had enough to drink by then so she didn't want to drink anymore. The defendant was still drinking but still in control, and Mr Treadwell was moving to be very drunk if not already there. During the course of the time at the YMCA there was no dispute that the defendant went to the toilet. What transpired is in dispute.
49. On ZZ's version, ZZ showed him the way, ZZ said there was a sort of encounter and he asked her to go back into the toilet with her; she refused and that was the end of it as far as she was concerned. It was not so much a sexual encounter more a preliminary gambit, albeit a bit blunt. Mr Alfred says something very different. He said that this girl, to whom he had not talked when they shared a taxi, was there when he came out of the toilet; he had not done up his belt fully and without any warning, she kissed him on the lips, then pulled down his trousers and boxers and put the tip of his penis into her mouth and then proceeded to give him oral sex. He pulled back, so did she, he did up his trousers and then went back to the gathering. Nothing was said and Mr Alfred said that it freaked him out.
50. The next event in the set of events which I shall describe, which was after toilet incident. They didn't talk to each other back in the party. It is not in dispute that Mr Treadwell was sick and that he and Mr Alfred had clearly overstayed their welcome, despite Mr Alfred strenuously trying to make things right and offering to clear up. The party wanted Mr Treadwell to go, and Mr Alfred wanted both he and Mr Treadwell to be gone. They went outside to have a smoke and it is not in dispute that he said nothing to Mr Treadwell about the alleged incident outside the toilet. Mr Alfred said he wanted to get back to Hillside as soon as possible, and he also wanted to get Mr Treadwell back.
51. There is no dispute that Mr Alfred and Mr Treadwell sought directions to Hillside, and ZZ offered to escort them back to Hillside because it was not out of her way. ZZ said she took them back to the camp and there was some exchange between them that the camp wouldn't let them enter in that state. She disputes that and she said that she left them....ostensibly left them to it. The version of events from Mr Alfred and Mr Treadwell is very different. They said that they didn't know where they were and wherever she took them it wasn't via Hillside camp. They both described different types of roads that they took from the YMCA. Mr Alfred described it as pathway. Mr Treadwell clearly describing a road.
52. It is the complainant's case that, thereafter, she went home not along roads which were dark and isolated, but by a rather better lit route and that she was followed by the two men, Mr Alfred and Mr Treadwell. According to her she was travelling fast to try and out- distance them and was simply aiming for home with the idea of just getting in and being in the safety of her own home. But at one point on the walk Mr Alfred took her in a forceful grip by the hand and Mr Treadwell caught up and linked arms with her. She had felt increasingly less in control as the walk had progressed. Mr Alfred and Mr Treadwell have a wholly different account, but there are some similarities between Mr Treadwell and the complainant. However, in terms, they said that they were wholly lost and reliant on the complainant who initiated the holding of hands with Mr Alfred and then the linking of arms with Mr Treadwell; that she was comfortable with them, talking freely and had offered to let them stay at her house and had reassured them and volunteered the information that they would not be disturbing anyone as she lived alone in a house.
53. Once they arrived at the house again the versions of events are strikingly different. The complainant said she unlocked the door hoping to get in, Mr Alfred pushed his way in saying he wanted to go to the toilet, followed by Mr Treadwell. Whereas Mr Alfred says that Mr Treadwell went in first and he went in last. Thereafter according to ZZ, Mr Treadwell went into the sitting room to lie down and there was a blanket there already, and Mr Alfred went to

the toilet whilst she went into a bedroom to drop off her keys to the side table, her money below the TV screen, and her telephone down on the bed.

54. Mr Alfred and Mr Treadwell say nothing of the sort. According to them, they were invited in and in fact Mr Treadwell was given a blanket by the complainant which she got from the cupboard and Mr Alfred was directed into the bedroom and he went straight in. Thereafter, according to the complainant Mr Alfred assaulted her which involved pushing her down onto the bed, trying to remove her trousers, actually unzipping his trousers exposing his penis which was semi-erect, and trying to force her head onto his penis. He was suggesting threesomes with his mate, he didn't succeed and she escaped and fled.
55. Mr Alfred's version is that nothing happened at all; he was in the bedroom; she came in put something down on the bedside table, he didn't know what as he didn't look round and then the complainant just left. And at that point he felt that he should go and he did so immediately. Mr Treadwell says he was woken by the light from the bedroom shining on him as the door opened and the Mr Alfred said they should go. Mr Alfred was stressed; he got up, got dressed, went to the toilet and ran to catch Mr Alfred up and fell into some bushes in the process and fell over a barbed wire fence. His evidence is a little varied about these points I shall have to come back to that later.
56. Thereafter Mr Alfred and Mr Treadwell were lost in town and were walking for at least an hour until they came to a light on in a house which turned out to be Father John's. They knocked and he came out. They then spoke and he accompanied them part of the way and directed them the rest of the way to Hillside. They made it back to Hillside Camp and went to bed and were arrested soon thereafter. Once arrested there were comments by Mr Treadwell in the car that he was chased by pikeys, and once in the police station and placed in different cells Mr Alfred commented that he wasn't a paedo, that he didn't touch her. He said I'm not a rapist, they'll believe this bird over us and I'm being made out to be a fucking rapist. This was overheard and was taken down by PC Zena Butler in her notebook.
57. Moving back to ZZ, we now move into the account she gave to different people and my analysis of her credibility really begins here. It has been submitted by Miss Lindop that there are differences in her accounts, discrepancies. There is no dispute that there are discrepancies and so I have considered the evidence of ZZ, and how she gave evidence, with some care.
58. Once out of the house she rang her sister YY. There is no dispute about that. Her sister gave evidence that on the phone, ZZ, her sister, was distressed and asking to come and stay at her house and she and her partner went to collect her. YY went by vehicle to her sister's house to collect her but had missed her, and, when not there, rang her and found that she was at a certain location and went to collect her there. Retrospectively she recognised that what she had seen was the front door left open. When they got back to YY's home, her partner went back to bed and the two sisters stayed up for a while.
59. YY reports that her sister was distressed on the phone, and I can draw inference about the level of distress from the reaction of YY. ***Her evidence is that ZZ rarely cries, she is calm and, importantly, avoids confrontation.*** I want to come back to that. But additionally YY's reaction on receiving the phone call was to get into the car and drive. No getting out of her nightwear and getting into daywear, no getting dressed. Neither her nor her partner; but dressed as they were in nightwear. There was clear evidence of an acute sense of urgency and they got into the car and just drove, and I find that YY thought that her sister, ZZ, was distressed at the time.
60. The first report of the incident was made by ZZ to YY. If the alleged incident happened, the first account was made within a very short time of it happening and there was little time to make a story up. Here was a sexual attack and, as Miss Lindop rightly points out, there are

inconsistencies from one account to another so it's necessary to analyse the account. YY said that ZZ was reluctant to give a full account and just wanted to put it behind her. However, what account she did give was not in good chronological order and was jumbled and confused. YY grasped that it involved two men in her house; she had an impression that it involved a sexual attack of some sort and I find that she jumped to the conclusion that the sexual assault was by two men.

61. I don't criticise her for that. She had been met with a distressed sister giving a scrambled account and didn't quite know what had happened. In fact, later on when PC Zena Butler came to the house, it was YY who said she thought something more had happened and said that Zena Butler, the Police Officer, should speak to ZZ. YY clearly felt that she did not have the full story, but I do not find that this is an inconsistency in ZZ's story. It also explains some of the Police logs, telephone calls from YY, and at that stage one of YY's primary concerns was that the men might still be at the house and that needed to be looked into by the police. She also wanted to go back to bed. So that explains some of the inconsistencies in the first disclosure, if can put it like that, to YY.
62. PC Butler and PC McPhee went to ZZ's house. There was no real sign of a disturbance. There was a duvet which looked as though it hadn't been made – I don't regard that as signs of a disturbance and I don't draw any conclusions from that. The door was open and they tested to see if the men were still there and that they weren't. Those two Police Officers then go back to YY's home, and the next account is in fact given by ZZ to PC McPhee. The Police Officers rightly separated the two sisters to take a statement apiece.
63. But before that PC McPhee, in his oral evidence done by video link, remembered that ZZ had said something to him. That was not in his notebook and not in his statement. That's a pity and I don't understand why not. It's a clear principle in these sort of cases that the first account of anything said should be recorded, if necessary, on the first piece of paper to hand, and recorded with accuracy. It is not for the officer to second guess what is relevant or not, or to assume that a subsequent statement absolves him from recording an initial expression by a complainant. For all he knew it might have been the only thing she was going to say; it might implicate the defendant; it might have completely exonerated him. He wasn't to know and I am disappointed that it wasn't recorded. However, it wasn't. Through my deliberations and my consideration of the evidence I am not going to rely on this piece of evidence and I cast it from my mind.
64. PC Zena Butler gave evidence. She referred to her notebook to aid her memory which had then been fleshed out in statements for the court. ZZ described a man called Kieron and another man she called Tredder. Although Kieron is the wrong name, there is no dispute she has identified the right men. They followed her back home. Tredder went into the living room and went to sleep and the other man, Kieron, forced his way into the bedroom by shoving her. He pulled down his trousers and underwear and his penis was erect, and he kept saying he wanted his stepbrother to join in. In cross examination and submissions about the accounts Miss Lindop points out that the complainant told PC Butler that she was grabbed. She points to these discrepancies, *inter alia* that she was grabbed around her waist and pushed her down onto his penis which was erect, not semi-erect. In her own statement ZZ refers to her head being pulled down. She repeated that in oral evidence, and her oral evidence **did** change within the cross examination about what was happening in the bedroom. For example, where Mr Alfred put his hands during the assault, whether she was lying down, whether he was astride her or standing up, how she got away, a push to the gut or knocking his hand away from her head.
65. The cross examination, for the record, I find was conducted by Miss Lindop sensitively and professionally. Undoubtedly there are inconsistencies. Miss Lindop says there are so many on such an important piece of evidence that I cannot be certain so that I am sure of the assault. I

remind myself the various warnings and cautions I gave myself during my directions about stereotypes and the approach to evidence where there are inconsistencies, and indeed where there is a consistent story as well. But in **any** case, not only where there are allegations of a sexual nature, but where there is a fast moving piece of action, inevitably there are problems about remembering the minutiae, particularly when what is happening in one area, eg what one hand is doing, overlaps or runs in parallel with what another hand is doing or in respect of another part of the body. This is all the so more in an allegedly traumatic incident where the focus would be on the penis, the force of her head down onto the penis and the need for flight. That is what ZZ would be focusing on. I watched her giving evidence very carefully. Whilst her demeanour was flat, I had a clear impression, and I find that she was genuinely trying to help the court and genuinely trying to remember and trying to tell the truth. It had been a traumatic event.

66. Initially she had not wanted to press the matter further to trial and simply wanted to put it behind her. She was finding it difficult to remember matters outside the central features I have mentioned and she found it difficult to go back there emotionally in her memory. She didn't want to. It was her way of dealing with it. I saw in no element of wanting to get either man in trouble gratuitously. Further on the salient features and the lead up to the event, from The Narrows Bar to the YMCA, to her walk to her home, she has been consistent. Those matters, although still traumatic, will be less so than the events of the bedroom which perhaps explains why she is rather more consistent. I find that any inconsistencies are explicable and that, nevertheless, she was consistent on the primary details.
67. I turn back to the defendant. The Prosecution say that the defendant knew exactly what he had in ZZ's case. That during his time in the cells there was an interchange between himself and Mr Treadwell, noted by PC Butler. It is said by the Crown that the reference to the rape, when nothing had been mentioned about that to them is a clear slip in that he knew any complaint about him was grounded in truth. It had happened. In response, Mr Alfred said that PC McPhee had said something about touching little girls and hence the comment about rape and about being a paedo, and that the offence did not involve children so where would he have got this from. PC McPhee denies saying anything of the sort. I don't have to decide every point, and I don't think that this helps me one way or the other and I leave the remarks within the cells to one side, I don't rely on them.
68. Having considered the credibility of ZZ, it is right that I should also consider the credibility of Mr Alfred. He is a man of good character and I direct myself that this assists me when assessing his credibility and assists when he says he is not the type of person who would do this sort of thing. Additionally I have heard a character witness read which describes his attitude as a solidier in glowing terms. That was borne out in the evidence that I heard; that he is caring about this friend and looking after him when he was very much the worse for wear and for his offer to clear up after his friend's vomiting. I had a very clear impression that he was mortified by what Mr Treadwell had done. I note Mr Alfred's distress in the witness box. It seems to me that he was frustrated that he could not convince others of his version of events. This distress was genuine, and I have given it a lot of thought but ultimately I find that his credibility is dependent on the plausibility of the version of events he puts forward.
69. And so, I go back to the beginning and the series of events, to the YMCA and to the incident of the toilet. I was surprised that ZZ did not mention this incident, relatively uneventful though it was, to DC Ross when he came back to take another statement from her on whether there had been an oral sexual act as described by Mr Alfred. So I watched very carefully as ZZ gave evidence about this incident, and indeed having commented that her evidence was given flatly, this piece of evidence showed some animation, some colour. She did not, I find, exaggerate what happened; if anything she minimised it. Her evidence was measured, and was a description of what I have described as an opening gambit on the part of Mr Alfred which she didn't rebuff so much as remove herself from the scene. She was also willing to accept

that she could have been mistaken about the name Keiron. If she had wanted to make more of it she could have said that it was a false name, and that had she wanted to get Mr Alfred in trouble she could have done so, she could have made more of it. She didn't do so.

70. As for Mr Alfred's version of events, he was questioned about his time in the toilet at length by Mr Hart. I must confess I have learned more about what men do in toilets during the course of Thursday afternoon than I have learned in a lifetime. I hadn't quite realised it was so complex, and perhaps that's the point - it isn't. The real issue is whether he came out of the toilet not having done up his belt properly by that stage. Leaving aside the politeness of that in someone else's home, I think it is likely that he hadn't done up his belt properly by then. Maybe he was just being careless.
71. Mr Alfred said that, during the incident that he describes, nothing was said, and by 'nothing said', I mean it was done in stone cold silence on both sides. No explanation by either party, no comment, no query and also no comment to his friend back in the party or back in the gathering. Nothing was said at or during the party by either Mr Alfred or by ZZ. Mr Alfred said that he was freaked out by it. That is a strong reaction but nothing is said by him to anyone, not only at the party, but later outside the YMCA in the car park whilst talking to Mr Treadwell, not whilst walking after they left the YMCA with the same girl, not after they left ZZ's home where - according to Mr Alfred - there was another very bizarre act involving the same girl... **and** they were wandering around Stanley for about an hour and nothing was said during this period.
72. I take the view and find that this version of events is implausible, and I find that ZZ's evidence about the relatively insignificant encounter, as she put it, at the toilet to be truthful. I find as a fact that the encounter was as described by ZZ and wholly reject the events as described by Mr Alfred.
73. Turning then to the walk from the YMCA to Hillside and beyond. The descriptions by Mr Treadwell and Mr Alfred of the type of road they are on were very different – they can't both be right. But even allowing for a lapse of memory on one or the other part, a glance at the map shows a straight line from the YMCA to Hillside if one heads even generally west, unless one goes due north towards the sea which would be clear, or due south away from the sea which would also be clear, you can't avoid Hillside Camp and it's accepted that it was recognisable once there. The alternative is the complainant took them on a deliberately roundabout way to avoid the Camp. Again I wholly reject that version of events. I find that they did go via the camp site and whatever the excuse, Mr Alfred and Mr Treadwell decided that they were not ready to go in yet.
74. The walk from Hillside to ZZ's home. ZZ's description is of mounting concern, of a diminishing sense of control of the situation and was compelling. She was trying to outdistance them. The hand grabbing that she described occurred quite near to her home. There may have been some pleasantries and conversation exchanged and it may even have looked to an outsider, a pretty drunken outsider, Mr Treadwell, that there was flirting. According to ZZ that was absolutely what Mr Alfred was doing; he was flirting. I find that it was Mr Alfred who instigated the hand holding. I am reminded of the evidence of XX that she had an impression that ZZ was avoiding confrontation. That was her way of protecting herself as she headed for home which she regarded as refuge and as protection. After all a front door is a strong psychological barrier to anybody who might seek to get in there. But I find that as she was walking along with her hand in Mr Alfred's, it is not so much that there was **permission** for this by her, but that it was **submission** and I find on the evidence of the tight grip he had of her hand that he knew that, and he knew exactly what he was doing.
75. At the house. Again her description of what happened at the entrance is plausible. I find that Mr Alfred used the excuse to go to the toilet as an excuse to get into the house and pushed his

way in. She had no proper chance to avoid it. She was overborne on this as she was on the way to the house. She did say that he could use the toilet and then go. I find that Mr Treadwell didn't care very much at all at this stage what was going on. He just wanted to get his head down and did so. The description about getting a blanket out of a cupboard is just too muddled. ZZ's description of the blanket always being there is borne out looking at the photos taken some days after. It is there. Mr Alfred said that he knew that she lived alone and how could he know this if she hadn't have told him. It is a good point. It is probably his best point. It may be that it came out in general chit chat during the evening between out of town soldiers and locals. It may even be that she **did** disclose it in the walk from the YMCA. I am certain so I am sure that it was not tantamount to or prefacing an invitation to stay over, and it certainly does not displace the findings that I make next.

76. Even if I ignore all the other events of that night and just look at what happened in the few minutes in the bedroom, I am certain the events described by the complainant, ZZ, are accurate. Her account of the salient features has not altered. The description of Mr Alfred coming into the bedroom, pushing her down, unbuttoning his trousers, trying to unbutton hers, trying to force her head down onto his penis, has remained. There may be difference between and erect penis and a semi-erect penis. I do not consider the degree of erection to be significant. It is not an exact science in the context of what was clearly a developing event.
77. More significantly, I find the defendant's version of events wholly implausible -that having invited them in, in an uneventful way that she just leaves and that there is no apparent reason for this and she is found a few minutes later very distressed for absolutely no reason at all. I find that wholly implausible. I find that there are internal inconsistencies in that version of events. Once that is added to the evidence that the defendant almost immediately considered it was time to go, and did go, speedily. So urgent was the necessity to exit that he didn't even wait for his friend to get dressed and possibly even to go to the toilet. ...With an almost comical description of how they just ran for it leaving the front door open. And I find that they did run for it, without any real care for the direction they were going in, climbing over barbed wire - not just a fence but barbed wire.
78. Mr Treadwell adopted part of his interview to the Military to this extent: that Mr Alfred was stressed when they said they should leave the house, that there was panic, that he had to run to catch him up, that he had to find him. During cross-examination and by re-examination, that had changed and diminished to a 100 metre jog and the stress was due to not knowing where they were. I find that in evidence that he was doing the best for his mate. In some respects that is laudable, but it raises large question marks about all of his evidence including what he describes as the atmosphere on the journey from the YMCA and the manner in which they entered the house, and about the blanket. At times, when pressed robustly, his memory was a blur, at others it was crystal clear. I consider that his evidence, when in support of the defendant, is unreliable.
79. What is compelling in its implausibility is his repetition that when he left the house he didn't know what was going on. If so, and it makes it so bizarre, totally implausible, that in the following hour when they were roaming around Stanley – and I accept at that stage they were lost – there was no conversation about what had happened in the house. Given that the defendant had been at the receiving end of two very bizarre encounters, where he had been freaked out, with the same woman, he did not say anything about the incident outside the YMCA toilet.
80. I remind myself about attitudes of stereotyping.
81. The defendant is entitled to exactly the same caution in his evidence as any complainant who is the recipient of a sexual attack, as in reality that is what he alleges, and he deserves the same respect and same approach as any victim in that regard. I have to caution myself when

viewing his evidence, but I do not have to discount the complainant's evidence when I caution myself in that regard. He had no explanation for that failure to discuss that matter with Mr Treadwell, and he did not offer any explanation or any proper one. Not only do I find the complainant's evidence to be consistent on the significant and salient matters, but I find her whole version of events has an internal consistency, and an internal consistency that is wholly lacking in Mr Alfred's version of events. It underpins my findings that I have made.

82. So I turn to the elements of the offence. It is accepted that if I find that he pushed her head down onto his penis, that is an act that goes further than mere preparation. I find that he did so. It's right that knocking a hand away, or pushing him away in the guts in the course from the assault and I find, in fact, that she did both, and that vitiated consent. It's common sense that that vitiates consent and that consent was not there.
83. Turning specifically to the route map, the Prosecution made me sure that Mr Alfred tried to place his penis into the mouth of ZZ. I answer that question with an emphatic yes, I accept the evidence wholly of ZZ and I'm certain so that I am sure about that evidence.
84. Am I sure that the penetration was intentional, in other words did Mr Alfred mean to try to place his penis in the mouth of ZZ rather than by, for example, accident. It flows from what I have said that I find and I am certain that I am sure that he pushed her head down, and that cannot be by accident, and it was deliberate and intentional, so the answer to that question is yes.
85. So I go to Question Three. Consent is not an issue in this case and in respect of Question Three and Four but I am sure that ZZ did not consent. I answer the question. I am certain so that I am sure the answer to question four is yes, and that Mr Alfred did not reasonably believe that ZZ consented to penetration,; again I am certain so that I am sure and I answer yes and he is guilty therefore of this count.
86. As I find that he is guilty of this count, I do not need to go to Count Two nor to consider Count Two.