# In The Supreme Court of Bermuda

**APPELLATE JURISDICTION**
**2020: 18**

JEMARI BELBODA

Appellant

-v-

FIONA MILLER
(POLICE SERGEANT)

Respondent

# JUDGMENT

*Appeal against conviction in the Magistrates' Court- Sexual Assault- Section 323 of the Criminal Code- The Law on Consent – Whether there is an Honest Belief in Consent – Effect of a Failure by the Accused to put an aspect of the Defence Case during Cross-Examination*

| | |
|---|---|
| Date of Hearing: | 04 March 2022 |
| Date of Judgment: | 23 March 2022 |
| | |
| Appellant | Ms. Elizabeth Christopher (Christopher's) |
| Respondent | Ms. Shaunte Simons-Fox for the DPP |

JUDGMENT delivered by Shade Subair Williams J

## Introduction

1. This is an appeal against Magistrate Mr. Khamisi Tokunbo's finding of guilt against the Appellant on Information 19CR00101 to a charge of sexual assault, contrary to section 323 of the Criminal Code.

2. The Appellant complained before this Court that he was wrongly convicted by the learned magistrate and that his conviction should accordingly be quashed without any order for a retrial.

3. Having heard Counsel for both sides on their oral and written submissions, I reserved judgment which I now provide with my reasons.

## The Evidence at Trial

**Background**:

(The Appellant and the Complainant's Relationship)

4. Mr. Belboda, born on 1 September 1994, is a former member of the Bermuda Police Service (BPS). He and the Complainant, who was also employed by the BPS, were previous colleagues and friends. At the time of the sexual assault, the Complainant was 23 years of age.

5. Providing some insight into the background of their friendship, the Complainant stated at trial during her evidence in chief that she had never previously had any sexual or romantic interaction with the Appellant. She explained that she and the Appellant were friends who spoke daily by phone and had previously socialised together as friends. On occasion this included their respective spouses. The Complainant's description of their friendship was purely platonic.

6. Mr. Belboda's former Counsel, Mr. Marc Daniels, cross-examined the Complainant at trial. During cross-examination, the Complainant agreed that she knew Mr. Belboda to have a "*kind of soft*" general demeanour. The Complainant also agreed that her previous conversations with the Appellant broached intimate and personal details about their lives including discussions. By way of example, the Complainant accepted that she would previously chat with the Appellant about her sexual interactions with others and their sexual body parts and her non-use of underclothing. The Complainant explained; "*yeah, he was like one of my girlfriends, basically*" and disagreed that there was a flirtatious dynamic between her and the Appellant. Her evidence was that she would often go to Mr. Belboda to vent about her own relationship issues for a male perspective. When it was put to the Complainant that she had never before expressly told the Appellant that she had no sexual or romantic interest in him, she disagreed. She said; "…*I call him "work wife", "girlfriend", my sister, basically, very – I've told him I'm not attracted to him in that way*."

7. The Appellant, on the other hand, claimed that he "*always got a flirty vibe*" from the Complainant and that there were "*always sort of sexual innuendos, within the conversation topic*." That said, the Appellant also stated; "*We were very comfortable talking with each other about anything. There weren't really any off topics that were just off the table*."

**Evidence of the Events leading up to the Sexual Assault**:

**(**The Night of 5 December 2018 and the Early Morning Hours of 6 December 2018)

8. On the night of 5 December 2018 the Appellant and the Complainant travelled together in the Complainant's vehicle to the Police Recreational Club (PRC) for an evening of Karaoke fun. The Appellant had arrived at the Complainant's residence on his motor bike before they left together in her car to go the PCR. Before leaving, the Complainant tried on different outfits, seeking the Appellant's opinion. She changed into her prospective outfits in the privacy of her bedroom and elicited his views once she was clothed. After that exercise, the two of them left and went to the PCR.

9. While at the PCR, both the Appellant and the Complainant consumed several alcoholic beverages. The Appellant said that he had about five Heineken beers and a glass of black rum and coca cola ('black and coke'). He said he was feeling the "buzz" of the alcohol and was feeling "nice", although not incoherent. The Complainant was drinking vodka cranberry and had about six cups full. At approximately 2am, together with three other police colleagues, the Appellant and Complainant left the PRC to attend Ice Queen in the Rural Hill Plaza, Paget for fast-food take-out. In doing so, all five off-duty officers travelled together in one of the other officers' car. Thereafter, they returned to the PRC in order for each of them to recoup their respective vehicles and part ways.

10. Remaining in the company of the Complainant, the Appellant left the PRC in the Complainant's vehicle. From there, they returned to the Complainant's father's home where the Complainant was house-sitting while her father was overseas. The Complainant said that she invited the Appellant to overnight at her father's home due to the lateness of the hour and as a show of concern that the Appellant once before fell asleep while operating a vehicle on the road. When cross-examined, the Complainant agreed that it had already been agreed prior to that night that the Appellant would overnight there. Evidence of text messaging between the Appellant and the Complainant established that on the previous day, the Complainant suggested to the Appellant that he could "crash" at her Dad's house on the couch.

11. Once inside, the Appellant went to the living room and the Complainant went to the bathroom. While the Complainant was in the bathroom, the Appellant, having brought a change of clothing in his gym bag, dressed down to an undervest and t-shirt and a pair of running shorts.

12. When the Complainant came out of the bathroom, she offered the Appellant a glass of Concord Grape wine. At that point the Appellant was still in the living room. It seems that it was at this point that he was sitting on the living room couch with his cellular phone in his hand. The Complainant told him that there was some left-over Concord Grape wine in the kitchen and pointed out where the glasses were for him to pour it for

himself, which he did. While seated on a kitchen stool, he drank from his glass and chatted with the Complainant who stood on the other side of the kitchen counter. This conversation in the kitchen lasted for no more than two minutes, according to the Complainant's evidence under cross-examination. There is a conflict on the evidence as to whether the Appellant brought his second drink with him into the living room and bedroom. The Complainant's evidence was that he did not.

13. The Complainant said that she offered the Appellant a choice between sleeping on the couch in the living room and sleeping on the second bed located in her room. Mr. Daniels put it to her that she never mentioned a second bed to the Appellant; however, the Complainant maintained that she did. It was also put to the Complainant, to which she agreed, that the Appellant asked her if she was sure in reply to her offer for him to sleep in the same room with her. The Appellant, in his own evidence, said that the Complainant's invitation for him to share the bedroom with him caused him to think that things were unexpectedly going to "*another level*".

14. When the Appellant went into the bedroom with the Complainant, he positioned himself on the second twin-size bed. The Complainant stated in her evidence in chief that she was tired but was conversing with the Appellant as they laid in their separate beds for an approximate half hour. Under cross-examination, the Complainant agreed that the two of them were engaged in face to face conversation while sitting on their respective beds. Under cross-examination, she said this lasted no more than twenty minutes.

15. During that 20-30 minute conversation, the Complainant said that she asked the Appellant about his girlfriend and queried when he might propose marriage to her. The Appellant's evidence was that he told the Complainant that his girlfriend was experiencing depression and that they were having relationship challenges. The Appellant told the Court that he expressed to the Complainant how lonely he felt and that the Complainant told him that he did not deserve to be treated that way. The Appellant said the Complainant's response was "*How could she do that to my "Belly"*?" ("Belly" was another nickname the Complainant used for the Appellant.)

16. The Appellant stated to the Court that he construed the Complainant's response to mean that she held him in a higher regard than friendship. He added that the Complainant also said words to the effect; "*I don't think I could ever do that to you*." He said that his made him feel that the Complainant wanted to stand in the shoes of his girlfriend. According to the Appellant, he was finishing up his wine beverage at this point.

17. The Complainant's evidence is that she told the Appellant that she was going to sleep and she rolled over in her own bed to face away from the Appellant. Notably, the Complainant was still wearing the same clothing she went out in: leggings and a long t-shirt with no underclothing. As she was lying on her stomach in her own bed facing away from the Appellant, the Appellant was lying in the other bed and the bedroom

was dark. Thereafter, she fell asleep, covered by her bed sheet and a comforter bed spread.

**The Evidence of the Sexual Assault**:

**(**The Early Morning Hours of 6 December 2018)

18. The Appellant said in his evidence in chief:

"*Well, then we continued talkin' until I finish, I finish my wine, and at that point we had stopped talkin' for maybe 35, maybe 40 seconds, and I get up from my bed and walk over to hers. And I pulled back her cover*."

19. Awoken from her sleep, the Complainant said she felt someone pull down her leggings, completely removing one of the leg sleeves. During cross-examination she said she woke up when her pants were removed. The bed sheet and comforter had been removed from her without her noticing. The Complainant said that she noticed a light being flashed by the Appellant. She was able to make this observation because her eyes were open at this point. The Complainant said that she made a slight movement and heard the Appellant responsively back off. She said she heard him step back and hit the other bed. When asked by the prosecutor what happened next, the Complainant said:

"*Um, he didn't touch me for a bit, so I figured he'd leave me alone, and then he, um, came back and, like, with his light on his phone or some light, but I'm guessing his phone, and he started, like, basically trailing his hand down me like this, like, I guess, to test to see if I was up or anything*."

20. The Complainant said that when Mr. Belboda trailed his hands alongside her buttocks she continued to face the wall away from him. She said she flinched and heard him jump back onto the other bed. The Appellant then got back up and came over from his bed towards the Complainant. He reached up and attempted to grab a hold of her breast under her shirt but was prevented from doing so because the Complainant was still lying on her stomach. When the Appellant explained this interaction at trial he said he ran his hand along her thigh as a "*sort of a foreplay move to see how she would react*."

21. The Complainant said that the Appellant resumed touching the Appellant's waist-down area with the light back on. He stopped for a while and then advanced to touching the Complainant between her thighs and on her vagina. The Complainant said she flinched again but he just stepped back. Without retiring from his efforts, the Appellant then touched the Appellant's vagina and inserted one of his fingers into her vagina. The Complainant said she did not move or say anything when he did this. Instead she pretended to be asleep. Explaining her reason for not having openly protested, she said:

"*I figured as long as he thought I was asleep he wouldn't have –- he wouldn't go any further… if he didn't think he got caught doing somethin', he wouldn't escalate. … I wouldn't have expected him to do anything like to that extent, like period, so, I, I, I didn't know how he would switch up if he had realised that I was up and I knew he was violating me. I didn't want Belboda to know that I was awake because if he thought, like, that I, I, I knew what he was doing, then he'd think, "Oh, well, got caught already, might as well do more*."

22. The Complainant told the Court that the Appellant's finger was inserted in her vagina for a period lasting between one and two minutes. Under cross-examination, the Complainant agreed with Mr. Daniel's suggestion that within a matter of a second or two, Mr. Belboda touched her vagina after she awoke to her pants being pulled off from her. However, she rejected the suggestion put to her that all of the touching lasted less than a minute. Under re-examination she said that she endured the entire ordeal for approximately half of an hour.

23. On the Appellant's evidence of his touching of the Complainant, he said that "*there were no significant body movements*" from her when he pulled down her tights. He said "*it was just a smooth pull down, there wasn't no* [any] *force.*" From that point, he said he ran his hand back up her leg and touched her buttocks. When asked what he was thinking at that time, he said;

"*I was – I was thinking that she had always complained to me that she always had to initiate every sexual act of her boyfriend, so I was just try-na take the lead, take the charge*."

24. The Appellant's evidence was that the Complainant hiked her left leg up into a loose "4" position which he appears to have demonstrated for the learned magistrate. He described that her legs were "*open slightly*" and said that he construed this as an invitation for him to continue. He said he moved his left hand from her thigh and slid it up between her legs, touching her vagina which he said was lubricated. This, he said was his moment of realisation:

"*At that point, when there was no movement, I looked up and saw that her eyes were closed...I dressed back. I stepped back away from the bed and pulled the cover over her…Because I thought that she had fallen asleep, and decided to dress back. .. Because I didn't think there could be any consent if she's asleep*."

25. Mr. Daniels asked Mr. Belboda to describe the first point at which he realised that the Complainant was sleeping. To this, the Appellant said; "*As I reached up towards her chest area that first time*."

26. The Complainant said that after Mr. Belboda finished touching her, she heard a rubbing-type noise which lasted probably a minute. During her evidence in chief she said she

also heard a snap sound as the Appellant turned the flashed light off. At that point, the Complainant said that Mr. Belboda left the room and the Complainant heard running water from the bathroom. Using only her hands, the Complainant searched for her phone but to no avail. She therefore remained in the same belly-down position and awake throughout the night after the Appellant returned to the room and slept in the other bed.

27. The Appellant never spoke about the Appellant's evidence of a snap sound or his turning off the light she said he was flashing. The Appellant and his Counsel were also silent in relation to the Complainant's evidence that she heard a rubbing-type noise from him which lasted an approximate minute. Mr. Belboda's evidence was that after he stepped back he left the room and went to the bathroom to wash his hands before finally settling into the second bed. Once in bed, he said he used his phone to look at Instagram (social media) before finally falling asleep at some point after 4am.

**The Evidence of the Immediate Aftermath of the Sexual Assault**:

**(**Day-break on 6 December 2018)

28. Describing the events of that morning, after day-break, the Complainant said that the Appellant got up from his bed and left the room. In those moments, she said she pulled up her pants before Mr. Beldboda re-entered the room. On the Complainant's evidence, when he returned to the room, the Complainant was sitting up on her bed. The Appellant then said with attempted levity; "*Oh, um you took your pants off last night. Don't worry, I was a gentleman, I didn't look*." The Complainant said that she did not correct or confront him. Instead, she allowed Mr. Belboda to leave the residence without telling him that she knew that he had assaulted her. She did this to avoid an altercation between them while they were alone in her father's home. Under cross-examination the Complainant said that she did not need to encourage the Appellant to leave promptly because he did so of his own accord after he ended the call with his mother.

29. The Appellant's account of that morning is that he awoke around 8:30am. He said the Complainant slept in till about 11:00am and was awoken by a call he received from his mother. He said that he and the Complainant then chatted for about a half hour before he left the residence. Mr. Belboda's evidence was that the Complainant "*seemed out of it*" which he put down to her being tired. The Appellant's Counsel asked the Appellant about the Complainant's allegation that he said "*Oh, um you took your pants off last night. Don't worry, I was a gentleman, I didn't look*". That question and answer exchange unfolded as follows:

"**Q.** *In terms of… Next. Going [indiscernible] back at the house, I believe [Complainant] said in her evidence that at some… Let me just get this straight. I might be mixing up the timeline [indiscernible], we'll go over it in due course, but there was*

*a suggestion that was put to you about how you had pulled the covers up and that you were a gentleman; do you remember [Complainant] saying something like 1 that?*

***A.*** *I don't recall saying anything about those –- I don't recall saying anything about those lines.*

***Q.*** *Okay. So, to ask the question about whether you were in the house, was there any discussion between you and [Complainant] in relation to what had happened earlier in the morning?*

***A.*** *No.*

***Q.*** *In terms of… Well, knowing that that happened and that you had been under, um, that you had engaged in touching her, why did you not speak with 13 her in the morning about what had happened?*

***A.*** *Um, the reason why I didn't speak about it is 'cause at that time I guess I was feeling guilty because I was in a committed relationship at the time…And when she didn't bring it up –[interrupted] Yeah. When she didn't say anything, initially when she woke up, I thought we were just gonna move past it*."

30. Turning to the point shortly after Mr. Belboda left the house, the Complainant said that she contacted a BPS psychologist because she did not want to return to work where she would be expected to interact with the Appellant who worked on her same shift. This BPS psychologist assisted the Complainant at a later point in formally reporting the sexual assault.

31. The Complainant said she probably spoke to the Appellant by WhatsApp later on the same day after he left her residence without alerting him to her knowledge of the sexual assault. During those exchanges the Appellant casually texted the Complainant about the mess his dog left at his residence overnight and teased her about her pending wax appointing, stating; "*I hope the lady burns your lady bits…psh*".

**The Confrontation between the Appellant and Sexual Assault**:

**(**8 December 2018)

32. The Complainant purchased a tape-recorder in preparation for her eventual confrontation with Mr. Belboda. Prior to that confrontation which occurred days later on 8 December 2018, the Complainant told the magistrate at trial that the Appellant "*was going to work and acting like everything was normal and trying to keep up with conversation…*".

33. On the day of the confrontation, the Complainant messaged the Appellant to advise that she wanted to purchase one of his puppies. In company with another female person, she attended his residence and confronted him about the assault. She asked him if she had done anything to make him feel it was okay for him to touch her as he did to which she said he replied; "*No, it weren't you, I just wasn't thinking… and I felt guilty, that's why I stopped*." The Complainant said she told him that she didn't want to hear it and that she thought she could trust him but that he just made her feel disgusted.

34. The Complainant also asked him if the light he was flashing during the assault was used to record her. The Appellant denied making any recording and offered the Complainant an opportunity to verify this by looking through his phone. However, the Complaint declined the offer and told Mr. Belboda that she wanted no further communication with him. She then walked away and returned to her car. Unbeknownst to the Appellant at the time, this entire exchange was witnessed by her female companion and was audio recorded on the device she purchased.

35. The Complainant submitted the audio recording of 3 minutes and 58 seconds to a BPS case officer. This recording was evidence called as part of the Crown's case at trial. In the material parts of the transcript of the recording it states:

"…

| | |
|---|---|
| *Complainant:* | *… I actually want to talk to you about Tuesday. Because I woke up when you were thing… so* |
| *Mr. Belboda:* | *(Sigh)* |
| *Complainant:* | *I would like to know why you would do that?* |
| *Mr. Belboda:* | *The thing was, like I'm not gonna sit here and say I didn't know what I was doing but…it was mostly…I was just…I don't know…I was stupid* |
| *Complainant:* | *Ok but was it something I done to make you think that was fine.* |
| *Mr. Belboda:* | *No… it was more on the lines of, when you sad that stuff bout… oh you can sleep in the room and then…* |
| *Complainant:* | *But in separate beds* |
| *Mr. Belboda:* | *I know, I'm not trying to excuse it, I'm not excusing what I did. I was wrong. I was wrong 100% and I felt bad and that's when I went back, and I just went to sleep. I felt bad. I felt terrible. Once I came to my senses I felt terrible.* |

| | |
|---|---|
| *Complainant:* | *I mean I know you had a light… so my next question is did you record or did you take pictures of me?* |
| *Mr. Belboda:* | *No, no, no I did not. You want?... I can show you my…* |
| *Complainant:* | *No I don't want to see your phone. I don't, I don't want to be friends with you anymore really* |
| *Mr. Belboda:* | *I understand. I understand completely* |
| *Complainant:* | *I woke up right after you had pulled my pants, so I know all of that from there on… until you left. I just didn't turn around because I didn't know what to do and I couldn't believe you were actually touching me like that.* |
| *Mr. Belboda:* | *I'm sorry… I would..* |
| *Complainant:* | *I… And that's also why I was sick for work, because I… basically it messed me up like Belboda* |
| *Mr. Belboda:* | *I understand completely (inaudible)* |
| *Complainant:* | *Yeah I don't want a puppy, I don't want anything from you, anything to do with you, at all* |
| *Mr. Belboda:* | *I understand* |

…"

36. In an attempt to explain his responses, the Appellant told the Court at trial that both his sister and his little cousin were within earshot distance of the Complainant while she was confronting him. He said his sister and his little cousin were just staring at him while this was happening.

37. The Complainant also said that he was initially confused when the Complainant asked him; "*What made you think you could touch me like that?*" He said this confused him because there had been no previous mention of this since the occurrence of the event. Recounting what he said to the Complainant, the Appellant said;

"*Ah, yes, um, I started attempting to explain that the, the reasoning was, like how she invited me in the bedroom, her demeanour… That it was, it was the way she invited me in the bedroom, that night. The way she invited me into her bedroom that night… And her demeanour when I was already set up on the couch.*"

38. The Appellant said that he again spoke to the Complainant by text messaging after she left. The Appellant informed the Court during his evidence in chief of the text exchanges between him and the Complainant that same afternoon:

"***Q.*** *Okay. Then there seems to be another entry underneath that at 15:19.*

***A.*** *Yes. Yes.*

***Q.*** *What do you say there?*

***A.*** *I said, "I understand that you never want to speak to me again but would you like me to request a transfer from A Watch?"*

***Q.*** *Was this before, during, or after* [Complainant] *had come to your residence?*

***A.*** *It was just after she left.*

***Q.*** *And what else? There's another entry at line 17.*

***A.*** *Yes. She said, "You didn't give a shit about violating me when I was asleep. Why should you give a shit now. You only changed up because I called you out on it. You didn't care about acting like you didn't assault me until I called you out on it. I don't give a fuck what you do."*

***Q.*** *Why did you write, at line 15, "I understand that you never want to speak to me again but would you like me to request a transfer from a watch?" What's that about?*

***A.*** *She, she said it, that she didn't want to see me or speak to me ever again.*

***Q.*** *And was there any response that you made, following what* [Complainant] *said at line 17 to 19?*

***A.*** *No.*
***Q.*** *And why didn't you respond to that?*

***A.*** *At that point I didn't think there was any conversation that could be had.*"

## The Grounds of Appeal

39. By a Notice of Appeal dated 24 August 2020, the Appellant's former Counsel appealed solely on a catch-all ground that:

"*The Learned Trial Magistrate erred in law and in fact when he made a finding that was not supported by the evidence*"

40. However, Ms. Christopher argued the appeal on three points which do not appear to have been formalised in an Amended Notice of Appeal. Ms. Christopher complained in her written and oral submissions that Magistrate Tokunbo erred in: (i) his approach to the issue of credibility; (ii) his application of the law relating to a defence of honest belief in consent and (iii) his application of the legal principles settled in *Browne v Dunn* (1894) 6 Reports 67 and the effect of a failure to put an aspect of the Accused's case during cross-examination.

## Analysis and Decision

**The Magistrates' Approach to the Issue of Credibility:**

41. Ms Christopher submitted that the learned magistrate's assessment of the Appellant's credibility amounted to an error of both fact and law. It was argued before this Court that the magistrate failed to properly approach the question of credibility in two ways. Firstly, he misquoted or mischaracterised the evidence which he used to determine the Appellant's credibility. Secondly, he effectively reversed the burden of proof by failing to independently assess the strength of the Crown's evidence and the question of reasonable doubt, notwithstanding his rejection of the Defence case. Ms. Christopher complained that the magistrate consequently and wrongly required the Appellant to prove either that the Complainant consented to the sexual acts or that he, the Appellant, held an honest belief in the Complainant's consent.

42. The impugned portion of Magistrate Tokunbo's judgment states as follows:

"*I have now had the opportunity to fully review all of the evidence in this case and recall and consider the evidence of each witness separately, taking particular note of their demeanour when testifying- especially the complainant and the defendant. I have also considered the legal authorities cited by Counsel.*

*In my view the complainant was a credible witness who gave an honest account of what she recalled and how she felt at the time of the incident.*

*I have no reason to doubt her version or to believe that she is looking to unjustly hurt the defendant, whom she regarded as a close friend. I accept her evidence and insistence that she did not consent to the touching.*

*My assessment of the Defendant is that he was a decent young man of previous good character who also enjoyed the companionship of the complainant and regarded her as a close friend. I believe he too was largely a credible witness. But for one area.*

*The big questions for determination are these:*

1) *Did the defendant honestly believe the complainant consented to his behaviour- the touching of her body and, if so;*

2) *Was his belief found on reasonable grounds?*

*In my judgment the defendant did not honestly believe the complainant consented or was consenting to his actions. To the contrary, I believe the defendant found himself, on the night, in a tempting and opportune predicament. Perhaps bolstered by the fact that he was feeling nice, to use his words. I believe the defendant yielded to the temptation and the opportunity and circumstances he found himself in. That is, he thought he would "test the waters." Or again, to use his language, he did what he did "as a foreplay move to see how she would react," and he continued in the hope that she was agreeable. He eventually stopped after going on in depth (with the touching) and being arrested by his conscious*…"

43. Another passage from the judgment which is said to be relevant to this ground of complaint is as follows:

"*Further support or evidence that the defendant did not believe she consented is that when she, the complainant, confronted the defendant, she asked him the all-important question: "Was it something I done to make him think it was like OK for him to do what he had done?" He said "No, it wasn't you. I just weren't thinking. I felt guilty. That's why I stopped."*"

44. Ms. Christopher contended that Magistrate Tokunbo misspoke when he said that the Appellant thought he would "*test the waters*" … "*as a foreplay move to see how she would react*…" Ms. Christopher suggested that this language was not part of any of the evidence. Counsel, however, erred. The Appellant did, in fact, say in his evidence at trial that he ran his hand along the Complainant's thigh as a "*sort of a foreplay move to see how she would react*." As for the use of the term "*test the waters*", it seems to me that the magistrate was more so making a statement of his own finding of fact rather than misquoting the evidence.

45. Ms Christopher also suggested that Magistrate Tokunbo was in error by assigning the following words to the Appellant: "*No, it wasn't you. I just weren't thinking. I felt guilty. That's why I stopped*." Again, I am bound to reject this assertion of misstatement. Indeed, the Appellant stated during the audio recorded confrontation between him and

the Complainant; "*No, it weren't you, I just wasn't thinking… and I felt guilty, that's why I stopped*."

46. On my final analysis, the magistrate did not mislead himself on the evidence in any material or significant way. So, in this sense, I see no reason to fault the magistrate for referring to this evidence in assessing the Appellant's credibility.

47. The remaining question is whether the magistrate's assessment of the Appellant's credibility amounted to a reversal of the burden of proof. Ms. Christopher relied on the decision of the Bermuda Court of Appeal in *Antoine Bean v The Queen* [2002] Bda LR 19 where Astwood P expressed his approval of the trial judge's directions to the jury on the issue of burden of proof but went on to criticise remaining portions of her summation on the same issue. Astwood P said:

"*However as she progressed through the summary of the evidence she proceeded to give the other directions complained of by Ms. Christopher as derogating from the effect of the general directions on the burden of proof. This seems to have come about because she lost sight of the fact that the Appellant did not have to prove anything. He did not have to make the jury sure that he did not commit these offences. The directions should have been that if his explanations were accepted by them, and if his explanation satisfied them that he did not commit these offences, or if the explanation created doubt, they should acquit. But that if his explanations were rejected by them, then they could only convict if they were satisfied and felt sure that the girl had told the truth concerning her sexual connection with the Appellant.*

*Moreover, the judge should have directed the jury that they may reject both the girl's and the Appellant's stories, and that if they did so, they had to acquit.*

*The directions referred to by Ms. Christopher were fatal to a conviction*."

48. Ms. Christopher would be correct in pointing out that the learned magistrate did not expressly state his understanding that even after having rejected the Defence case and the Appellant as an entirely credible witness, he had to nevertheless return to consider the strength of the Crown's case and assess whether he had cause for reasonable doubt. Setting out a specimen of standard jury directions settled in Canadian Supreme Court case, (2) R. v. W. (D.), [1991] 1 S.C.R. 742, Ms. Christopher pointed to the established approach:

1. *If you believe what the Defendant says, you must acquit*

2. *If you do not believe the Defendant but you are left in reasonable doubt by what he says you acquit*

3. *Even if what the Defendant says does not leave you in doubt, you must ask yourself whether, on the basis of what you do accept, you are convinced beyond a reasonable doubt*

4. *If, after careful consideration of all of the evidence you are unable to decide who you believe, then you must acquit the Defendant.*

49. Although the magistrate did not employ the above language in his reasoning, he clearly came to a firm view that the Appellant knew at all material times that the Complainant was not consenting to his sexual acts. Magistrate Tokunbo found; "*the defendant did not honestly believe the complainant consented or was consenting to his actions… and he continued in the hope that she was agreeable*." These findings of fact were made by the magistrate, having "*had the opportunity to fully review all the evidence in this case and recall and consider the evidence of each witness separately , taking particular note of their demeanour when testifying – especially the complainant and the defendant*."

50. In my judgment, there is no proper basis for the complaint that the learned magistrate accepted the Complainant's evidence only as a mere alternative to that of the Appellant. It is plainly stated in Magistrate Tokunbo's judgment that he found the Complainant to be a "*credible witness who gave an honest account of what she recalled and how she felt at the time of the incident*." Crucially, he added; "*I have no reason to doubt her version or to believe that she is looking to unjustly hurt the defendant, whom she regarded as a close friend. I accept her evidence and insistence that she did not consent to the touching*."

51. The absence of consent was not disputed at trial or before this Court. Instead, the Appellant raised and relied on the defence of honest belief at trial. This left the magistrate with the task of deciding where he believed the Appellant held an honest belief in consent or was left in reasonable doubt as to whether the Appellant honestly believed the Complainant was consenting to his sexual touching of her. However, in this case, the magistrate not only rejected the Appellant's claim to hold and honest belief, but also believed and accepted the Complainant's evidence as truthful. Particularly, the magistrate pointed to the Complainant's evidence of the confrontation between her and the appellant as not only credible, but proven beyond any reason for doubt.

52. For these reasons, this ground of appeal fails.

**The Magistrates' Application of the Law on Consent (Honest Belief)**

53. Ms. Christopher took issue with the following statement made by Magistrate Tokunbo in his judgment:

"*If I am wrong on this point, and the Defendant did honestly believe the complainant consented or was consenting to his behaviour, I find that his belief was not reasonable. This brings me to the reasoning and answer to the second question for determination by the court. Was his belief found on reasonable grounds?? My answer to that question is no. The defendant's belief that she consented or was consenting was unreasonable for the following reasons:*

1) *Notwithstanding any playful flirtations, personal daily interactions the two of them had, either in person or via WhatsApp, it is clear that the complainant regarded the defendant as if he was girlfriend and the defendant knew and accepted this.*

2) *The two had never kissed or been intimate with each other nor even discussed any sexual acts or conduct between them.*

3) *The defendant agreed that the conversation between them while sitting on opposing beds in the dark was not sexual, nor was there anything of a sexual nature before or when she offered him to sleep in the room with her.*

4) *The mere invitation to sleep in her bedroom on a separate bed instead of a couch in the living room is not, without more, consent or an invitation to be sexually intimate. She did not unclothe and remain unclothed in his presence or invite him to sleep in the same bed as her.*

*I find as a fact that the defendant had, indeed, crossed the line, and in view of all of the foregoing, his belief that the complainant consented or was consenting, was unreasonable*."

54. The Appellant's grievance with this portion of Magistrate Tokunbo's reasoning is founded on his assertion that the Court wrongly applied an objective 'reasonable' test in determining whether he, the Appellant, held an honest belief in the Appellant's consent.

55. Under Division III (Offences against the Person) Part XV (Provisions of Law Relating to Violence to the Person and to the Preservation of Human Life) of the Criminal Code the term "assault" is defined as follows under section 233(1):

"***Interpretation of Part XV***
*233 (1) A person who—*

*(a) strikes, touches, or moves, or otherwise applies force of any kind to, the person of another, either directly or indirectly, without that other's consent; or*

*(b) by any bodily act or gesture attempts or threatens to apply force of any kind to the person of another without that other's consent, under such circumstances that the person making the attempt or threat has actually or apparently a present ability to effect his purpose,*

*is said to assault that other, and the act is called an assault.*"

56. Pursuant to section 233(3)(b)(ii) there is no consent where "*the complainant, having consented to engage in the activity, expresses, by words or conduct, a lack of agreement to continue to engage in the activity*…"

57. Similarly, under section 233(3)(b)(v) there can be consent where "*the complainant is incapable of consenting to the activity*."

58. However, subsections (5) and (6) afford a defence of honest belief in sexual assault cases:

"…
*(5) In relation to an assault, where an accused alleges that he believed that the complainant consented to the conduct alleged to be the assault, the judge, if satisfied—*

*(a) that there is sufficient evidence; and*

*(b) that the evidence, if believed by the jury, would constitute a defence,*

*shall instruct the jury that they must, when reviewing all the evidence relating to the determination of the honesty of the accused's belief, consider the presence or absence of reasonable grounds for that belief.*"

59. As I found in the recent decision handed down in *R v Jamel Simons* [2022] (SC) Bda 13 App (2 March 2022), an honest belief in consent need not be a reasonable one as the offence of sexual assault is not an absolute or strict liability offence. (See *DPP v Morgan* [1976] AC 182 (1975)). This means that the Crown is required to establish a guilty intent on the part of the Accused, as an essential element of the offence. In *R v Jamel Simons* I accepted that an intention cannot be said to be a guilty one if there was an honest belief of consent, whether that honest belief was reasonably formed or not.

60. In *R v Jamel Simons* I provided the following case summary and commentary on *DPP v Morgan:*

"*…the question before their Lordships, as certified by the Court of Appeal as a matter of general public importance, was* "*whether, in rape, the defendant can properly be convicted notwithstanding that he in fact believed that the woman consented, if such belief was not based on reasonable grounds*". *This traced back to whether the trial*

*judge was right in directing the jury that the defendants should nevertheless be convicted of rape even if they were satisfied that there was an honest belief in consent, so long as that honest belief was unreasonably formed. So, questions of law arose on the quality of an accused's belief in consent and the evidential burden of proof.*

*Effectively, Counsel for the DPP submitted that the actus reus is having intercourse without consent and that the mens rea is formed simply by having an intention to have the intercourse. Counsel in that case cited R v Tolson 23 Q.B.D. 168 in an attempt to compare this approach to that said to be applicable to the offence of bigamy where a person unreasonably believes that the earlier marriage no longer subsisted. On the question of burden of proof, the Crown submitted that the evidential burden of proof is on the accused who raises the defence of an honest belief and that where such a defence is sufficient so to justify it being put to the jury, the onus would revert to the Crown to prove that the defendant had no such belief or reasonable grounds for so believing.*

*The Defence, on the other hand, argued before their Lordships that an honest belief in consent is enough and that it matters not whether it be also reasonable. The submission made by the Defence was that any evidence intending show a reasonable belief could only be relevant towards and supportive of its honesty. Conversely, evidence showing the unreasonableness of the belief could only be relied on by the Crown to undermine the accused's contention that the belief in consent was honest. So the complaint made by the Defence was the trial judge erred in making reasonableness as well as honesty an ingredient of the defence of honest belief.*

*In the opening speech of the judgment, Lord Cross of Chelsea distinguished rape from the offence of bigamy, stating [8]:*

"*…But, as I have said, section 1 of the 1956 Act does not say that a man who has sexual intercourse with a woman who does not consent to it commits an offence; it says that a man who rapes a woman commits an offence. Rape is not a word in the use of which lawyers have a monopoly and the question to be answered in this case, as I see it, is whether according to the ordinary use of the English language a man can be said to have committed rape if he believed that the woman was consenting to the intercourse and would not have attempted to have it but for his belief, whatever his grounds for so believing. I do not think that he can. Rape, to my mind, imports at least indifference as to the woman's consent...*"

*Looking at the fuller scope of "intent" Lord Hailsham of St Marylebone said [27]:*

*"…if the intention of the accused is to have intercourse* nolens volens*, that is recklessly and not caring whether the victim be a consenting party or not, that is equivalent on ordinary principles to an intent to do the prohibited act without the consent of the victim."*

*Lord Hailsham recognised that an honest belief in consent cannot be said to apply to an accused that is careless or reckless as to whether the victim has actually consented to the sexual act. Otherwise put, the guilty intention required is an intent to commit a sexual assault. A guilty intent to a commit a sexual assault includes a state of mind which is careless or reckless about the presence of the victim's consent at the outset and/or throughout the sexual act.*

*Lord Hailsham cited the decision of the Court of Criminal Appeal of New South Wales in Sperotto & Salvietti [1970] 1 N.S.W.R. 502 where the Court illustrated the mental ingredients of a sexual assault as follows [504]:*

"*In all crimes at common law a guilty intention is a necessary element and with the crime of rape this intention is to have carnal knowledge of the woman without her consent. In order to convict the accused of the crime of rape and, subject to what is hereinafter said, to establish this intention on his part the Crown must prove beyond reasonable doubt that when the accused had intercourse with the woman either (i) he was aware that she had not consented, or (ii) he realized that she might not be consenting and was determined to have intercourse with her whether she was consenting or not. The intent and the act must both concur to constitute the crime*."

*The above second example of intent constitutes the reckless component of the mens rea and is inconsistent with an honest belief in consent*."

*I now turn to the question of whether there is an evidential burden on an accused to raise a defence of 'honest belief in consent'. On my assessment of the law, the Defence cannot properly be charged with any such evidential burden. A guilty intent is an essential element of the offence of sexual assault and the Crown bears the burden of proving beyond all reasonable doubt that the accused was possessed of a guilty intent whether or not the Defence asserts an honest belief in consent. Support of this proposition was the basis of Lord Hailsham's approval of Lord Goddard's below statement in Steane [1947] K.B. 997 [1004] which provides:*

"*…if on the totality of the evidence there is room for more than one view as to the intent of the prisoner, the jury should be directed that it is for the prosecution to prove the intent to the jury's satisfaction, and if, on review of the whole evidence, they either think the intent did not exist or they are left in doubt as to the intent, the prisoner is entitled to be acquitted*."

61. I am, therefore, bound to agree with Ms. Christopher that the learned magistrate erred in his approach to law on whether Mr. Belboda held an honest belief that the Complainant was consenting to the sexual acts. That being the case, it is also plainly the case that Magistrate Tokunbo's misguided application of the law on honest belief in consent was an alternative analysis to his primary finding of fact that the Appellant did not honestly believe he had the Complainant's consent or agreement for him to

perform these sexual acts on her. Clearly, the magistrate satisfied himself beyond reasonable doubt that the Appellant knew all too well that the Complainant was sleeping throughout the entire period of his sexual performance on her and stopped only at the point when he was finally "arrested by his conscience".

62. For this reason, this ground of complaint cannot succeed.

**The Magistrates' Application of the Rule in Browne v Dunn (The Effect of a Failure by the Accused to put an aspect of the Defence Case during Cross-Examination)**

63. Turning to the final aspect of this appeal, the Appellant asks this Court to scrutinise the Defence's failure to challenge the Complainant during cross-examination about her evidence of the verbal exchange which occurred between her and the Appellant after the sexual assault. This refers to the Complainant's evidence in chief that the Appellant told her; "*Oh, um you took your pants off last night. Don't worry, I was a gentleman, I didn't look*." The complaint on appeal before this Court is that the magistrate ought not to have treated this evidence as unchallenged or have believed the Complainant's evidence that this statement was indeed made by the Appellant.

64. When the Appellant came to give his own evidence in chief and was given the opportunity to deny the Complainant's account of this after-math remark to her, he did not do so. Instead, he said; "*I don't recall saying anything about those - I don't recall saying anything about those lines.*" His lawyer then followed up by asking him if any discussion about the sexual acts occurred, to which he simply replied "*no*".

65. The prosecutor subsequently cross-examined the Appellant, putting it to him that his lawyer never challenged the Complainant on this crucial part of her evidence. When asked if he recalled her iteration of his morning utterance and why his lawyer was silent about it when cross-examining the Complainant, the Appellant answered; "*I remember her saying that…I don't recall if it was challenged or not*."

66. This all preceded the re-examination stage at which Mr. Daniels made a statement to the Court seemingly addressing the Defence's omission to challenge the Complainant. Mr. Daniels said:

"***MR. DANIELS:*** *I don't have RE-EX per se, but, um, I'm just trying to weigh this up, because the one issue that I would put -– I'm not sure to what extent to say waive privilege, but I'm trying to figure is that, I was thinking in my mind, um, there's the rule of Brown v Dunne, which the Court may be invited to consider, and I wasn't sure whether or not I should the witness, based on the suggestion that was put to her, what transpired, but, of course, that would be a, um, opening of privilege, and I don't know if I have permission to do that, if that makes sense.*

*So that puts –- I've actually not been in that predicament before. I might just have to invite the Court to consider the ruling, because obviously I don't have an instruction to open a privilege that's not my privilege to waive. So I think I'm –- I think I'm estopped from that, Your Worship, and I won't go there, at this stage.*

***THE COURT:*** *Okay.*

***MR. DANIELS:*** *[Indiscernible]. I think we can take the blame out of that for a moment. So yes, Your Worship, I would cease to have any further questions from this witness. Much is all factual that the Court can take into consideration…*"

67. Referring to this somewhat obfuscating statement, Ms. Christopher invited this Court to assume an understanding that Mr. Daniels neglected to follow through with his instructions from the Appellant to challenge the Complainant's allegation that the Appellant told her; "*Oh, um you took your pants off last night. Don't worry, I was a gentleman, I didn't look*".

68. However, having rejected the Appellant's defence of honest belief in consent, Magistrate Tokunbo stated in his judgment:

*"I find supportive evidence of this assessment when the court heard that the first exchange between the defendant and complainant later in the morning when they were both awake and spoke to each other, that the defendant explained to her in a purported joke, "Oh you took your pants off last night. Don't worry, I was a gentleman, I didn't look." He did not deny this to the prosecutor when it was put to him and neither did his counsel challenge the complainant about it.*"

69. Ms. Christopher argued that magistrate placed undue reliance on the fact that Mr. Daniels left the Complainant's evidence of the Appellant's remarks that morning unchallenged. Ms. Christopher pointed this Court to the English House of Lords' decision in *Browne v Dunn* where the rule was settled that a witness' attention must be drawn during cross-examination to any suggestion that his or her evidence is untruthful so that it is perfectly clear to that witness that it is intended that the credibility of that story will be impugned. Lord Herschell, L.C. stated [70-71]:

"*Now, my Lords, I cannot help saying that it seems to me to be absolutely essential to the proper conduct of a cause, where it is intended to suggest that a witness is not speaking the truth on a particular point to direct his attention to the fact by some questions put in cross-examination showing that that imputation is intended to be made, and not to take his evidence and pass it by as a matter altogether unchallenged, and then, when it is permissible for him to explain, as perhaps he might have been able to do if such questions had been put to him, the circumstances which it is suggested indicate that the story he tells ought not to be believed, to argue that he is a witness unworthy of credit. My Lords, I have always understood that if you intend to impeach*

*a witness you are bound, whilst he is in the box, to give him an opportunity of making any explanation which is open to him; and, as it seems to me, that is not only a rule of professional practice in the conduct of a case, but is essential to fair play dealing with witnesses. Sometimes reflections have been made upon excessive cross-examination of witnesses, and it has been complained of as undue; but it seems to me that a cross-examination of a witness which errs in the direction of excess may be far more fair to him than to leave him without cross-examination, and afterwards to suggest that he is not a witness of truth, I mean upon a point on which it is not otherwise perfectly clear that he has had full notice beforehand that there is an intention to impeach the credibility of the story which he is telling. Of course, I do not deny for a moment that there are cases in which that notice has been so distinctly and unmistakably given, and the point upon which he is impeached, and is to be impeached, is so manifest, that it is not necessary to waste time in putting questions to him upon it. All I am saying is that it will not do to impeach the credibility of a witness upon a matter on which he has not had any opportunity of giving an explanation by reason of there having been no suggestion whatever in the course of the case that his story is not accepted*."

70. In a recent decision delivered by Lord Justice Lewison, Lady Justice Asplin and Lord Justice Males, the English Court of Appeal in *Ras Al Khaimah Investment Authority v Azima* [2021] EWCA Civ 349 considered the rule settled in *Browne v Dunn* and said [84-89]:

"…

*84. The basic principle is not in doubt. As May LJ observed in Vogon International Ltd v The Serious Fraud Office [2004] EWCA Civ 104:*

*"It is … elementary common fairness that neither parties to litigation, their counsel, nor judges should make serious imputations or findings in any litigation when the person against whom such imputations or findings are made have not been given a proper opportunity of dealing with the imputations and defending themselves."*

*85. The question in reality is: what amounts to a proper opportunity? This court considered that question in Markem Corp v Zipher Ltd [2005] EWCA Civ 267, [2005] RPC 31. The court referred to the decision of the House of Lords in Browne v Dunn (1894) R 67, although indirectly via the judgment of Hunt J in the Australian case of Allied Pastoral Holdings v Federal Commissioner of Taxation (1983) 44 ALR 607. In Browne Lord Herschell said:*

*"My Lords, I have always understood that if you intended to impeach a witness you are bound, whilst he is in the box, to give him an opportunity of making any explanation which is open to him; and, as it seems to me, that is not only a rule of*

*professional practice in the conduct of a case, but is essential to fair play and fair dealing with witnesses."*

*86. Nevertheless, as Hunt J said in Allied Pastoral:*
*"His Lordship conceded that there was no obligation to raise such a matter in cross-examination in circumstances where it is 'perfectly clear that (the witness) has had full notice beforehand that there is an intention to impeach the credibility of the story which he is telling'."*

*87. What Lord Herschell in fact said in Browne was this:*
*"Of course I do not deny for a moment that there are cases in which that notice has been so distinctly and unmistakably given, and the point upon which he is impeached, and is to be impeached, is so manifest, that it is not necessary to waste time in putting questions to him upon it. All I am saying is that it will not do to impeach the credibility of a witness upon a matter on which he has not had any opportunity of giving an explanation by reason of there having been no suggestion whatever in the course of the case that his story is not accepted." (Emphasis added)*

*88. Hunt J concluded in Allied Pastoral:*
*"I remain of the opinion that, unless notice has already clearly been given of the cross-examiner's intention to rely upon such matters, it is necessary to put to an opponent's witness in cross-examination the nature of the case upon which it is proposed to rely in contradiction of his evidence, particularly where that case relies upon inferences to be drawn from other evidence in the proceedings."*

89. *That was expressly approved by this court in Markem. This way of putting the point leaves it open in a particular case for a judge to find that a witness has been dishonest, even though the dishonesty has not been put to him in cross-examination, provided that he has been given notice by other means that his story is not to be believed. There are, however, cases in which a stricter line has been followed*."

71. This narrative from the English Court of Appeal's Civil Division is both a broad and instructive guide as to the critical need to expressly challenge a Crown witness on any key matter which forms part of the Defence's opposing case. If applying these principles to criminal proceedings, under the context of Bermuda criminal law, the real question is surely: Did the Complainant/witness have the opportunity at trial to confront the contrary averment claimed on the Defence case?

72. In civil proceedings, the pleadings and discovery process entails a mutual exchange of documents which creates an increased and fairly even opportunity for each side to understand the opposing cases in detail prior to the start of any trial proceeding. So, it is more likely in civil proceedings that one party will be acutely aware of the particulars of the opposing facts to be challenged, whether or not those particulars are expressly

put during cross-examination. This allows for greater flexibility of the *Browne v Dunn* rule in civil proceedings than in criminal proceedings.

73. The statutory introduction of a Defence Statement creates a greater possibility of protection for Accused persons in criminal proceedings to the extent that an Accused has the opportunity to outline the factual detail of the Defence case prior to trial so to avoid any allegation by the prosecutor that he has fabricated a feature of his case for the first time on the witness stand. It is thus regrettable that the prevailing practice appears to entail the drafting of as skeletal a Defence Statement as permissible, an approach which is likely intended by Defence lawyers to cautiously protect Accused persons from the creation of a statement which poses a risk of conflicting with any developments of the Defence case at trial.

74. Procedurally, the filing of a Defence Statement is required after the stage at which disclosure is made by the Crown. In this case, the Defence would, no doubt, have been served by the Crown with a copy of the Complainant's witness statement to the police. This Court may also reasonably presume that the Complainant disclosed in her witness statement her account of these verbals uttered by the Appellant. If she had not, one would expect that this would have been put to her by Mr. Daniels in cross-examination. So, on a reasonable presumption that notice of this portion of the Complainant's evidence was made in her witness statement, I would note that it would have been open to the Defence to record any contention with this particular allegation in the form of a pleading in the Defence Statement. Had any such denial been contained in the Defence Statement, the prosecutor would have been hard-pressed to invite an inference of recent fabrication by the Appellant. Under any such circumstances, the Court would have been well within reason to allow the recalling of the Complainant for it to be put to her that the Appellant never said "*Oh, um you took your pants off last night. Don't worry, I was a gentleman, I didn't look*".

75. I have considered the pre-emptive effects of filing a well-drafted Defence Statement. On the side of more corrective measures, it was always open to Mr. Daniels as the Accused's Counsel and an officer of the Court to make an unequivocal statement to the learned magistrate that he personally erred in failing to challenge the Complainant on her evidence of the Appellant's statement to her that morning. Any such statement would have had to have been intelligibly conveyed to the Court to make it clear that the failure was nothing more or less than a professional oversight by Counsel, resulting only from a forgetfulness on Counsel's part to put the issue in question. Of course, all skill and efforts should have been employed by Counsel to avoid finding himself in such an embarrassing and unenviable position in the first instance.

76. Where none of these measures are available to an Accused person who is prepared to waive privilege in this respect, affidavit evidence may be required on appeal as a last resort. So in this case, it was open to the Appellant to seek leave of this Court to file evidence deposing that he did in fact instruct Mr. Daniels that he, Mr. Belboda, never

uttered the damning words which the Complainant assigned to him. However, no such application was ever made to this Court, notwithstanding Ms. Christopher's fleeting remark to this Court that Mr. Daniels would have been prepared to swear affidavit evidence to that effect.

77. The reality of this case is that the Appellant never denied having made the incriminating remark to the Complainant. At best, he said that he didn't recall have spoken those words. He had the opportunity to deny having made the statement in his Defence Statement and at trial on the stand, but he did not do so. So, even if Mr. Daniels was instructed to impugn the credibility of the Complainant's evidence on this point, the prosecution's case would hardly be weakened by any such challenge from Counsel when the Appellant's own evidence was that he did not recall whether he made the statement.

78. Going further, it is also difficult to envisage how the magistrate could have reasonably permitted the recalling of the Complainant, had any such application been made. Again, this is because the Appellant never denied making that statement on the stand. So Mr. Daniels would have been asking to put to her what was unsubstantiated on the evidence from the Defence. In any event, Mr. Daniels' statement to the magistrate was far from elucidating as it did not effectively communicate whether the failure to challenge the Complainant during cross-examination about the Appellant's morning-remark was a professional oversight on his part.

79. The magistrate also heard the Appellant's evidence under cross-examination that he himself didn't even recall whether his lawyer had challenged the Complainant about such a significant element of his defence of honest belief in consent. In my judgment, it was open to the learned magistrate to reasonably find that Mr. Belboda's lack of recollection was inconsistent with a man who had been wrongly accused in serious criminal proceedings of making an incriminating statement which he never said.
80. These are all points which the magistrate was not only entitled but duty bound to consider in assessing whether he had reason to doubt the Complainant's evidence which he had otherwise found to be wholly credible. In my judgment, the magistrate correctly found that the Complainant's evidence that the Appellant said "*Oh, um you took your pants off last night. Don't worry, I was a gentleman, I didn't look*" was unchallenged and worthy of acceptance.

## The Overall Strength of the Crown's Case

81. In my final analysis, the Crown's case was a very strong one.

82. The Complainant's evidence was that she continuously faced the wall away from Mr. Belboda when he trailed his hands alongside her buttocks. She flinched when he did this and she heard him jump back onto the other bed before getting back up and returning to her bedside, like creeping tomcat quietly hunting its prey. His attempt to

feel her breast under her shirt failed only because the Complainant was remained on her stomach. So the Appellant turned his flashing light back on and resumed touching the Appellant's genital and buttocks area and again stopped for a period of time. Emboldened to continue, Mr. Beldboda touching the Complainant between her thighs and on her vagina. Again, the Complainant flinched causing him to step back, but only momentarily. Without stopping there, the Appellant reached to touch and insert the Complainant's vagina with one of his fingers while he believed her to be unaware of this and asleep.

83. After all of that activity, the following morning Mr. Belboda sought to conceal any sign of the sexual assault by dishonestly saying; "*Oh, um you took your pants off last night. Don't worry, I was a gentleman, I didn't look*." Days later he was confronted by the Complainant, who took the trouble to purchase a devise for the purpose of recording her exchange with him, no doubt anticipating a confession or incriminating statement from him. Mr. Belboda during the course of that confrontation told the Complainant; "*I'm not trying to excuse it, I'm not excusing what I did. I was wrong. I was wrong 100% and I felt bad and that's when I went back, and I just went to sleep. I felt bad. I felt terrible. Once I came to my senses I felt terrible.*" This was followed up by text messaging between them later that same day, wherein the Complainant stated; "*You didn't give a shit about violating me when I was asleep. Why should you give a shit now. You only changed up because I called you out on it. You didn't care about acting like you didn't assault me until I called you out on it. I don't give a fuck what you do.*" Consequently, a close friendship between two police colleagues ended.

84. In my judgment, having carefully reviewed and examined all of the evidence called at trial, the Crown's case was compelling and the Magistrate's finding of guilt is unimpeachable.

## Conclusion

85. The conviction is safe and the appeal shall be dismissed on all grounds. Accordingly, I remit this matter to the Magistrates' Court for sentencing.

Dated this 18th day of March 2022

THE HON. MRS JUSTICE SHADE SUBAIR WILLIAMS
PUISNE JUDGE