SHORTER ARTICLE

ASPECTS OF GRAVE AND CRIMINAL ASSAULT

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1 A recent judgment of the Jersey Court of Appeal in the case of *Hill v Att Gen*[1] provides a rich seam of learning which advances understanding. In it, Sir William Bailhache, JA, who delivered the judgment of the court, provides a closely reasoned and thoughtful analysis of the concepts of assault in its various forms, of unlawfulness, and of consent.

2 First, the facts: the appellant was tried by a jury on seven counts. Of those counts, numbers 3, 4 and 5 are our concern. Count 4 which charged grave and criminal assault resulted in a conviction, as did Count 5 (which was a specimen count of rape on an occasion other than Count 3), and Count 3 which also charged rape. As will be seen in due course, the key to the part played by Count 3 in this appeal is that there was an acquittal on that count (as there was on all other counts save 4 and 5). The appeal was therefore on Counts 4 and 5, the only convictions secured by the prosecution. But one needs to keep an eye on the Count 3 acquittal nonetheless.

3 The case was about two young persons, the man ("A") a couple of years older than the young woman ("B"). Both were above the age of consent. They were in a consensual sexual relationship. On occasions, it was said, the appellant put his hands around B's throat—with her consent—during intercourse.

4 Count 4 asserted that on the occasion charged, the appellant had used unreasonable force during that kind of intercourse, causing B to lose consciousness—hence grave and criminal assault. The essence of the successful appeal on this count was that the Bailiff had not directed the jury on the significance of consent, and the relevance of any loss of consciousness on the part of B.

5 Starting with the loss of consciousness: it was an issue of fact in the trial. Had loss of consciousness been established by the prosecution,

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[1] [2022]JCA029 (James McNeill, QC (President), Lord Anderson of Ipswich, and Sir William Bailhache, JJA).

then naturally it would have been impossible for B to consent to anything while unconscious. That was the prosecution's basis for the charge of grave and criminal assault. Although consent can sometimes provide a defence to forms of assault, that need not detain the court here because in all logic she could not have consented to anything—she was insensible. That can have been the only basis of conviction.

6 This is where the acquittal on Count 3 comes in. It charged rape on the same occasion as the grave and criminal (hands around the throat) assault. The acquittal of rape means that the jury cannot have been persuaded to the necessary standard of proof that the intercourse on that occasion was without her consent—put another way, they considered that she may have been able to give consent and therefore logically could not have been unconscious.

7 That being so, it was inconsistent for the jury to convict of the grave and criminal assault—to which consent *might* have provided a defence—on the basis that B was incapable of giving consent because unconscious; yet to acquit of rape on the same occasion representing a jury finding that B may have been conscious. If she was conscious, she may have consented to the use of force inherent in the grave and criminal assault count, in accordance with the defence put forward.

8 The Bailiff had not directed the jury on the matters of grave and criminal assault in these circumstances, nor on the factual issue of partial choking, its bearing on the specimen rape charge at Count 5 of which the appellant had been convicted, nor of the possible impact of consent on the partial choking charge at Count 4, of which he had also been convicted.

9 In its most limited sense, this is a judgment about inconsistent verdicts. But it is so much more, as will become apparent after a discussion of the other conviction, that on Count 5, the specimen count of rape on occasions other than that charged at Count 3, of which the appellant had been acquitted.

10 Count 5 was a specimen count of rape, to the effect that on various occasions the appellant, following a consensual outset to the intercourse, had not stopped and withdrawn when B had asked him to do so. It gave rise to matters different from those discussed already.

11 The evidence of B on this count is described as "ambiguous and possibly tenuous." The submission of no case to answer might have succeeded had that evidence stood alone but the Bailiff was wrongly persuaded that the evidence was properly bolstered by messages sent to B by the appellant on social media. "Wrongly" because the messages, although admitting to not withdrawing and so being a "rapist," did not refer to any specific occasions, and could not of themselves found a complaint when neither the messages nor B provided evidence of

anything which was not covered by the rest of the indictment. It was not reasonable for the Bailiff to conclude that it was proper for a jury to convict in these circumstances. The appeal was therefore allowed and the appellant was discharged.

12 Again, in its most limited sense this was a judgment about nothing more than sufficiency of evidence but the judgment provides a big bonus, namely a painstaking, methodical analysis of key areas of the criminal law of Jersey.

13 It begins with the assault-based offences charged in Jersey. From the first edition of *Aspects of Sentencing in the Superior Courts of Jersey* nearly three decades ago, the author has remained grateful to a former colleague and mentor for preserving and pointing me towards the summing-up to a jury in 1974 by Deputy Bailiff Ereaut, as he then was, in the otherwise unremarkable case of *Att Gen v Vaughan.*[2] It is set out extensively in other parts of this work.

14 Although only a summing-up, it has provided valuable groundwork for an appreciation of the essential forms of assault charged in Jersey. It speaks of grave and criminal assault and of (common) assault and offers examples of both. It provides the reminder that assault in Jersey comprehends both assault (the threat and apprehension of immediate harm) and battery (the actual infliction of the violence). Assault and battery are English usages and are amalgamated into the single concept of "assault" in Jersey. There is no charge of battery here. Whether the facts require a charge of grave and criminal assault, or the lesser ("common") assault is one of degree; the degree of injury may be one determinant, but not the only one. See, for example, the facts and outcome in *Att Gen v Bardwell*[3]—a case of distress and trauma where the accused had followed his victim late at night for a considerable period before attacking her. He used no weapon and her physical injuries were slight but the facts were found to be capable of founding a conviction for grave and criminal assault.

15 Having dealt with *Vaughan*, the court in *Hill* moves on to note that intention is not the only form of *mens rea* in the assault-based cases—recklessness can also provide *mens rea*.[4]

16 The court next turns to the question of "unlawfulness" and first reviews English law on the point, in particular the forms of offence found in statute—Offences Against the Person Act 1861. The court notices s.18 (shorthand, "unlawful GBH [grievous bodily harm] with

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[2] Royal Ct., November 1974, unreported.
[3] 1996 JLR *N*–16.
[4] See *De la Haye v Att Gen* 2010 JLR 218, a case of grave and criminal assault.

intent"), s.20 ("unlawful GBH without the need to show specific intent", s.47 ("ABH"[actual bodily harm]). In each case, the *actus reus* of the offences must be done "unlawfully".

17 The *mens rea* of these offences, it is said, can encompass *Cunningham* recklessness,[5] and the *mens rea* of s.47 ("ABH") is the same as that for common assault not causing actual bodily harm.

18 The court reads across the Jersey facts to the English law, and concludes that, in the instant case, if B lost consciousness, then, things being equal, the s.47 offence would be made out because of the loss of her sensory functions. On the other hand, if there had been no loss of consciousness then again, *things being equal*, the case would be one of common assault. The injury would have been trifling and transient *no matter how dangerous the outcome might have been*.

19 The court adverts incidentally that an English prosecution on these same facts would now be affected by s.75A of the Serious Crime Act 2015[6] which creates the offence of strangulation, without the need to prove actual bodily harm: maximum penalty 5 years' imprisonment, as in the case of s.47 above. Consent is a defence, but not where the complainant suffered serious harm and where the accused intended or was reckless as to whether serious harm would be suffered. The court also makes relevant mention of s.71 of the Domestic Abuse Act 2021 which provides that consent to the infliction of serious harm for the purposes of sexual gratification is no defence, whereas it could provide a defence to a charge of common assault.

20 The court is led inevitably to *R v Brown*,[7] the case of consensual extreme sadomasochism between homosexuals. The accused were charged with various offences of s.20 GBH and s.47 ABH. Was consent to the behaviour a defence? The majority view of the House of Lords was that consent was no defence to either charge. Put at its broadest for the purpose of brevity, the decision was based on considerations of public policy.

21 As to s.47 ABH the judgment in the instant case adverts to *R v Wilson*,[8] a case in which the accused branded the buttocks of his wife with her consent. The defence of consent succeeded. Again, the decision was based on public policy and a refusal to intrude into consensual activity between husband and wife in the privacy of the home. In that case there was no aggressive intent and no evidence of

[5] [1957] 2 QB 396
[6] Inserted by section 70 of the Domestic Abuse Act 2021.
[7] [1993] UKHL 19; [1994] 1 AC 212.
[8] (1996) 2 Cr App R 241.

significant harm. Her consent therefore provided a defence. She had instigated the behaviour and the court was prepared to equate what had happened with tattooing or body piercing. Specifically, *Brown* was not authority for the proposition that consent had no use as a defence in the ABH cases. Consent could provide a defence even in the face of actual bodily harm. Crucial to the success or otherwise of such a defence will be the injury actually or potentially sustained. Where the evidence reveals a realistic risk of more than transient or trivial injury the opportunity for a successful defence falls away.[9]

22 The court distils the cases: consent can be a defence to assault (*e.g.*, boxing); thereafter, the questions to be confronted concern the extent to which the criminal law should be concerned with consensual activity, and in particular sexual activity in private; and consideration, necessarily, of the extent to which these are matters for the courts rather than the legislature.

23 Having performed that review of the English position, the court turns its attention to Jersey and first remarks that (absent certain specifics in the Sexual Offences (Jersey) Law 2018) the consent of a person over 16 is a defence to any charge alleging sexual impropriety. Equally, consent in Jersey is a defence to a charge of common assault.[10]

24 What of grave and criminal assault? There has to be a limit to the defence of consent to the infliction of serious injury. Further definition of the *actus reus* is given by the court as follows:

> "an unlawful application or threat of force by the Defendant on the victim which causes or risks substantial injury to the victim, or otherwise is committed in circumstances which the judges of fact consider to be more serious than would be reflected in a conclusion of common assault . . . causing or risking psychological injury would be as much part of the offence as causing or risking bodily injury."[11]

25 As to *mens rea* :

> "The *mens rea* includes the intention to apply unlawful force, or recklessness as to whether it is so applied (see paragraph 66 of the judgment of this Court in *de la Haye*)."[12]

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[9] See *Emmett* [1999] EWCA Crim 1710; *R v BM* [2018] EWCA Crim 560, [2018] 2 Cr App R 1.
[10] See *Querée v Att Gen* (Royal Ct) 2018 (1) JLR 39.
[11] [2022]JCA022, at para 55.
[12] *Ibid*, at para 55.

26 The view of the jury is vital; they decide whether consent was given; they decide whether the circumstances are such as to warrant a charge of grave and criminal assault.

27 Whether the application of force is lawful will, says the court, probably depend on whether absence of a hostile intent indicates there to have been a legitimate reason for the act (the example of grabbing at a child for its own safety is given, supposing the child to have been injured nevertheless).

28 In this case the court concluded that the directions to the jury on questions of consent and of unlawfulness in the instant case were inadequate or non-existent, the convictions set aside and the prisoner was released.

29 The court goes on to provide helpful guidance as follows:

> "(1) Consent is always available as a defence to common assault.
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> (2) If the jury determines that an assault reached the 'grave and criminal' threshold, other factors may be relevant to the question as to whether the defence of consent is available. We share the difficulties expressed by Lord Mustill in *Brown* of arriving at any 'general theory of violence and consent' but make the following observations.
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> (3) There are some types of activity (e.g. surgery, tattooing and contact sports) potentially giving rise to grave and criminal assaults but to which the issue of consent is potentially relevant and may (depending on the individual facts and circumstances) be a defence.
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> (4) In our judgment, however, there will be certain types of activity where it would be contrary to public policy for a defence of consent to be available to the jury. That will be the case, in particular but not exclusively, when the nature of the injury or attack, inflicted or threatened, is particularly egregious or grievous. A trial judge will make an assessment as to whether such a direction should be given to a jury on the facts of the particular case, and if necessary that will be tested on appeal to this court.
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> (5) In between such areas, a particularly anxious area may be that of sexual activity, as to which the circumstances before us in the present case allow us to offer the following guidance:
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> A) The possibility that consent may properly be raised as a defence to grave and criminal assault, during sexual activity not amounting to rape, will emerge where the nature of the injury sustained or threatened (or the lack of substantial injury) make consent a possible defence. The availability of

> the defence of consent will depend upon the nature of the particular activity that has given rise to the complaint and upon alleged consent having been given in circumstances showing that it was free and fully informed.
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> B) We do not consider, however, that a defence of consent could in any circumstances be left to the jury in circumstances where an act of choking during sexual activity resulted in a loss of consciousness, with its obvious and inherent risks of long-term incapacity if not also death. Manifestly those risks make it improper, as a matter of policy, to countenance that a right-minded individual—of whatever level of aspiration for sexual gratification—would give consent. Equally, as it seems to us, it might be said that there was an irrebuttable presumption that such alleged consent could not have arisen from a mental engagement both free and fully informed."[13]

30 The judgment casts helpful light on areas of previous uncertainty, and is greatly to be welcomed. The multiplicity of circumstances falling within the offence of grave and criminal assault in Jersey has previously been accepted by the Jersey Court of Appeal and helpful guidance also given as regards factors to be taken into account when sentencing.[14]

31 Although not referred to in the judgment, Sir Christopher Pitchers previously reviewed the ambit of the grave and criminal assault offence in contrast with its equivalents under the Offences Against the Person Act 1861.[15] Whilst he acknowledged the efficiency and practicality of the Jersey offence, he also referred to its lack of "fair labelling" and the scope for disputed issues of fact to remain unresolved when it comes to sentencing[16].

32 The court's further definition of the *actus reus* and *mens rea* of the offence of grave and criminal assault in this case may reflect a desire to bolster its ambit when faced with the challenges of the more unusual categories of conduct which fall to be charged within the broad offence. The judgment certainly illustrates the need for specific and additional

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[13] *Ibid*, at para 65.
[14] *Harrison v Att Gen* 2004 JLR 111, at paras 118–120.
[15] "Grave and Criminal Assault—Another View of the Landscape", (2011) 15 *Jersey and Guernsey Law Review* 52.
[16] The latter since addressed in art 50 of the Criminal Procedure (Jersey) Law 2018.

directions when dealing with such cases, as was also made clear by the Court of Appeal in *Harrison v Att Gen*.[17]

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[17] [2010]JCA136A.