

JERSEY / JUDGMENT

AG -v- A [2012] JRC 032 (07 February 2012)

[2012] JRC 032

Source: bailii.org · Research copy typeset by Esheria. Not court-issued or certified.

JUDGMENT

THE DEPUTY BAILIFF: 1. I sat as a single judge on 16 th January, 2012, to receive an application by Advocate Preston for the exclusion of evidence which the Crown proposed to lead in the forthcoming trial of the defendant on an indictment containing three counts of indecent assault, rape and gross indecency. I indicated on that day that I rejected the application to direct the Crown not to seek to adduce the evidence in question and that my reasons would be delivered later. This judgment reflects those reasons. The Charges 2. The defendant is charged with having assaulted his adopted daughter, then aged between 15 and 17 years on a day between 2 nd July, 1977, and 4 th July, 1979, at their home. He is also charged with having raped a different adopted daughter at the same address, the complainant being aged 15 years at the time, between 18 th February, 1978, and 20 th February, 1979. The third count is one of gross indecency with the second complainant at the same address between the same period. The Challenged Evidence 3. There are four areas of evidence to which the defence object. The sections of evidence fall naturally into pairs. 4. Firstly, the Crown wish to adduce evidence by the first complainant that she was raped by the defendant in England. The linked evidence to which the defendant objects is the evidence which the Crown wish to adduce that he confessed this rape to his former partner. 5. The second section of related evidence to which the defendant objects is that the Crown asserts that it found evidence on the defendant's computers of searches having been made for pornographic stories associated with incest and sexual activities of fictional persons under the age of 16, these searches having been made on a number of dates in 2008 and 2011. Linked to that evidence, the Crown wish to adduce evidence of an alleged confession by the defendant to the same former partner that he had accessed child pornography. The Alleged English Rape 6. At the hearing, Advocate Preston relied on his skeleton and did not seek to address me any further on this matter. The objections in the skeleton argument were these:- (i) The Court had no jurisdiction to try the allegation of rape in the United Kingdom; (ii) The allegation was not admissible as similar fact evidence. 7. In response, Crown Advocate Jowitt asserted the evidence was admissible to prove, for the purposes of the later indecent assault, that the defendant had a long standing and active sexual interest in this complainant, to explain the context of the charge of indecent assault and the complainant's conduct thereafter, and to corroborate, as similar fact evidence, the allegation of rape made by the second complainant. 8. It is perfectly plain that the Royal Court does not have jurisdiction to try a rape alleged to have been committed in the United Kingdom. However, it is equally plain that the Crown is not seeking to try the defendant on such a

charge. Furthermore, the jury will not be asked to enter a verdict on any such alleged offence. At its highest, the evidence will be considered by the jury as part of its route map to a verdict on the counts which are before it. 9. The basis on which the Crown wishes to adduce this evidence is that it is said to be relevant to the charges. Its relevance arises in two ways. The complainant's witness statement was given on 1 st June, 2011, in relation to an alleged indecent assault that took place in Jersey in the late 1970s. It is obvious that the jury will want to know why it is that no complaint was made at the time. The complainant's answer to that, according to her statement is that the day after the rape took place, the defendant told her that if she ever told anyone about what happened, he would kill her, or words to that effect. She said that she honestly believed that that is what he would do to her if she said anything, and so she never said a word to anyone for many years. That changed insofar as the complaint to the police was concerned because she was approached by the police who had been told by the defendant's former partner, when making a complaint about other matters that the defendant had admitted to raping the first complainant. There is no sensible way of explaining to the jury why the police approached the first complainant, and why the first complainant hitherto had said nothing to them, without permitting evidence of the alleged rape in the United Kingdom to be adduced. So the Crown say it is relevant in that respect. 10. The Crown also contends that the evidence is relevant because it suggests for the purposes of the later indecent assault that the defendant had a longstanding and active sexual interest in the first complainant. Otherwise the Crown would be in the position of having to persuade the jury that it was likely that the defendant would suddenly and apparently inexplicably decide one day to touch the first complainant's vulva. 11. Finally the Crown contends the evidence is relevant as similar fact evidence which is admissible to corroborate the allegation of rape made by the second complainant. There are similarities in their respective accounts:- (i) Both rapes were committed when the complainant's mother was absent from the family home. (ii) Both were committed when the defendant had been drinking whisky. (iii) Both took place in the family home, upstairs, after the complainants' bed times. (iv) Both rapes took place in the marital bed after the defendant had persuaded the complainants to go there. (v) Both rapes were immediately followed by a threat to kill the complainant if she told anyone. 12. The question is whether the evidence is probative of the offences which are charged. In my judgment the evidence is relevant for the reasons the Crown gives, the reliance which the Crown would wish to place on this particular evidence is not unfair to the defendant, and if there were any unfair prejudice to the defendant it can be removed by an appropriate direction to the jury. The Confession 13. It was suggested by Advocate Preston that if the evidence of the UK alleged rape was inadmissible then the confession would also have to be excluded. That of course cannot apply where it has been concluded that the evidence of the UK rape is in fact admissible. 14. I am also asked to exercise a discretion under Article 76 of the Police Procedures and Criminal Evidence (Jersey) Law 2003 , alternatively under my inherent jurisdiction to exclude the confession to the defendant's former partner. It is said that the former partner's evidence is intrinsically unreliable for a number of reasons, and that it relates to a confession given over 20 years previously. It is said that the alleged confession is materially inconsistent with the facts of the alleged rape, and finally that none of the procedural safeguards which attached to a confession made to the police have been observed, which makes this confession unsafe - in

particular there was no access for the defendant to legal advice, no note or recording made of the confession contemporaneously, neither was the defendant given the opportunity to agree with or dispute the alleged confession. 15. In my judgment none of these factors is material. As to intrinsic credibility, that seems to me to be a matter for the jury. The defendant's former partner will no doubt face searching cross examination, and it would be for the jury to make up its mind as to whether it finds her evidence to be credible or not. The evidence is not of itself intrinsically incredible. 16. While it is correct that there are differences between the facts and the alleged confession and the facts and the alleged rape as described by the first complainant, there is also some similarity. 17. As to the assertions that the confession was made a long time ago and there were no procedural safeguards, the circumstances underlying the alleged confession, according to the partner's evidence are that she was about to leave her first husband to go out with the defendant who was about to leave his first wife. According to the partner, the defendant said to her that his first wife "feels you ought to know this before we move in together" as the reason for explaining that he had raped his step daughter. If true, it would be unsurprising that the partner would remember the thrust of the confession. One would expect it to have made a mark with her. 18. The Crown contend that the confession is supportive of the evidence of the first complainant and therefore and goes to establish her truthfulness, and also serves to rebut any defence of fabrication which might be levied against the first complainant in relation to her explanation of what took place. I would accept the confession is capable of being so used. In my judgment therefore the admission of the evidence does not adversely affect the fairness of the proceedings such that I ought not to allow it to be admitted - than being the statutory test under Article 76 of the Police Procedures and Criminal Evidence (Jersey) Law 2003 , and a jurisdiction which is in my view wider than the common law power which the court has to exclude evidence. Computer Evidence 19. The Crown contends that the presence of evidence relating to paedophilic incest pornography on the defendant's computers is admissible on each of these grounds:- (i) To rebut the defence of fabrication by the complainants. (ii) To rebut the defence of fabrication by the former partner. (iii) To corroborate the confession to the former partner that he had access to child pornography. (iv) To establish a continuing and active interest in the conduct which the defendant is independently accused of. In making this submission the Crown emphasises that the evidence is not available on the basis of propensity but as independent evidence corroborating the complainants' accounts. 20. Advocate Preston submitted that the computer evidence revealed a much wider interest in all types of pornography and therefore it was unfair to highlight incestuous contact between fathers and daughters; that the evidence was limited to a number of dates in 2008 and 2011, and it could not be said that even if established to reveal an interest of the defendant at those times, it was probative of anything in relation to an incestuous relationship over 20 years earlier. It was also contended that there was no evidence as to whether any material was actually viewed, nor were the incest searches apparently limited to father and daughter material. The defendant relied on the Court's judgment in AG-v-Facchino

[2008] JLR 103 as authority for the inadmissibility of the computer evidence, and contended that the Facchino case was directly comparable to the present case. 21. To this the Crown contended that it was beyond coincidence and no one in common sense would accept it,

that two people might make up a story that is in fact demonstrated in terms of the defendant's interest by the computer evidence. 22. I have approached this on the basis that there are two questions for me to consider. The first is whether the evidence is relevant to any of the counts on the indictment. If it is not relevant, it is not admissible. The second question is whether, even if it be relevant, the evidence is more prejudicial than it is probative, and/or that it would be unfair to the defendant within the scope of Article 76 of PPCE to allow the evidence to be admitted. In this latter context, I remind myself that evidence which is quite damning of a defendant may indeed be regarded as very prejudicial to him. That is not the test that I have to apply. The question is whether it would be unfair to the defendant to allow the evidence to be admitted and that includes whether its probative value is slight compared with the prejudice which admitting the evidence would cause. AG-v-Facchino 23. In this case the defendant was charged with several counts of indecency against three boys aged 12 to 14. The boys alleged that they met the defendant at his place of work, that he gave them treats and that he took two of them to his home. At about the same time as the alleged offences, the defendant had written or had obtained a story involving graphic descriptions of offences of indecency against boys of a similar age to the victims in the present case. He also admitted to possessing indecent images of boys. Commissioner Clyde-Smith found that there was a striking similarity in the boys' evidence and therefore the evidence of each of them was admissible to support that of the others. However, the possession of the graphic story and the indecent images was not permitted to be adduced by the Crown unless the defendant gave evidence putting his character in issue, in which case the whole character was in and it would be open to the Crown to cross examine on this evidence as well. 24. Although Commissioner Clyde-Smith said that the evidence was more prejudicial than probative in that case it is clear from reading his judgment that in essence he found that the evidence was only relevant to issues of propensity and not to the offences which were actually charged. 25. If it were the case that this evidence were to be presented by the Crown as relevant to propensity, it would clearly not be admissible, unless it were directed to negate good character which had been put forward by the defendant. However Crown Advocate Jowitt was clear that the jury can and should be told that the computer evidence would not mean that because the defendant might look at this material online, he is more likely to commit the type of offences which the material disclosed. That is not the Crown's point. The Crown contention was that the defendant denied the offences and necessarily must be asserting that the two complainants had fabricated their stories, either together or separately. Whichever of those latter possibilities was the case, the evidence of the computer material was contended to be relevant because the Crown would say to the jury that it was inconceivable - beyond coincidence - that two complainants could make up a story that in fact reflected the defendant's interest in such matters, as demonstrated by the computer evidence. 26. In my judgment this was a fair distinction to draw, and the case is therefore distinguishable from the case of Facchino where the Court found that the evidence was only relevant to propensity. I therefore propose to permit the evidence to be admitted although the jury will need to be directed carefully as to the way in which the

evidence can be found to be relevant. That direction may change depending upon whether the defendant gives evidence and puts his character in issue. 27. The final part of the contested evidence which the Crown wish to put forward is that of a confession by the defendant to his former partner that he had viewed the child pornography, if indeed that is the proper meaning to attribute to what she says he said. The defendant contended that the evidence ought to be excluded under Article 76 of PPCE or in the exercise of the Court's inherent jurisdiction to ensure a fair trial. In my judgment the objections fail because if the substantive computer evidence is fit to put before the jury, as I have held that it is, it is necessary to include the confession, if that is what it was, so as to enable the Crown to contend to the jury that it could be satisfied that it was the defendant who had downloaded this material onto the relevant computers. 28. These are all directions given pre-trial. It is open to the defendant to renew the objections to the admissibility of the evidence depending upon the evidence which is actually given at the time of trial. Necessarily, I have had to form a view so far on the basis of the statements which have been produced. Authorities Police Procedures and Criminal Evidence (Jersey) Law 2003. AG-v-Facchino

[2008] JLR 103 . Page Last Updated: 02 Feb 2017 BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bailii.org/je/cases/UR/2012/>

CASE PAGE <https://chat.esheria.ai/case-law/jersey/ag-v-a-2012-jrc-032-07-february-2012>

Prepared on 24 October 2026 · Esheria