

JERSEY / JUDGMENT

AG -v- Bacon [2016] JRC 181 (06 October 2016)

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JUDGMENT

THE commissioner: 1. The defendant faces trial in November 2016 on an Indictment containing 14 counts. Counts 1 - 8 charge indecent assault of six boys who were pupils at School A where the defendant was a teacher, being head of the music department. The alleged offences took place between 1979 and 1983. Count 9 charges indecent assault against a young girl between 1982 and 1983 and Count 10 alleges indecent assault of a 9 year old boy in 2001/2 at which time the defendant was working as a driver. 2. The Court sat on 18 th August and again on 6 th September to consider a number of issues. Despite my having strongly advised the defendant on previous occasions that he would benefit from being legally represented and that he was likely to find it difficult to conduct his defence in person, he has chosen to continue to represent himself. In the light of the legal issues which have been identified, I had earlier appointed an amicus curiae to assist the Court on these aspects. The Court is most grateful to Advocate Steenson for his assistance. 3. The following issues arise for decision:- (i) Should Counts 6 - 8 and 4 be stayed as an abuse of process in view of the caution administered for these offences in 1985? (ii) Is the statement under caution made by the defendant in 1985 admissible? (iii) Are the Counts all properly joined in one indictment? (iv) If so, should any of them be severed and tried separately? (v) Is evidence of images found on the defendant's computer and mobile phones relating to the spanking of males admissible re Counts 1 - 5? (vi) Is evidence of certain conduct of the defendant in relation to the complainant in Counts 6 - 8 which took place in Guernsey admissible? (vii) Is evidence of certain conduct by the defendant towards the complainant in Count 5 which took place in Reading admissible? 4. I will consider each of these issues in turn but, before doing so, it is necessary to describe briefly the nature of the allegations in respect of each Count. The prosecution case 5. Counts 1 - 5 allege indecent assaults by the defendant in the context of the defendant administering or threatening to administer corporal punishment to the relevant complainant. All the complainants were pupils at the school. 6. Counts 1

- 3 all arose out of the same occasion. All three complainants had been told by the defendant to report to him at the music department for disciplinary purposes and they attended at the same time. They then went into the defendant's room in turn. The first to go in was the complainant in Count 1 who was about 14 at the time. He said that he expected to be caned and was asked to bend over. He was told to take down his trousers but not his pants. The

defendant then stroked the complainant's bottom in between his legs and touched his genitals before cupping his (the defendant's) hand around the complainant's genitals and pulling his hand back in a stroking motion. 7. In relation to Count 2, the complainant, who was aged about 14, was called in for discipline immediately after the first complainant and said that the defendant gave him three choices of corporal punishment with a plimsoll; ten strokes with his trousers up, five strokes with his trousers down and one stroke with both his trousers and his pants down. He elected for the five strokes and this is what was administered. 8. Count 3 relates to the third complainant, who was aged between 13 - 15, and who went into the defendant's room for punishment immediately after the first two. He was spanked 10 - 20 times over his trousers with a plimsoll. 9. The complainant in Count 4 was aged between 11 - 12 and forgot his swimming gear, which inconvenienced the defendant who said that he would have to whack him. Two or three days later he was called out of class and taken to the music block. He was given a choice of three whacks with his trousers down or six whacks with his trousers up. The defendant tried to put his hand inside the left front side of the complainant's trousers. The complainant asked the defendant what he was doing and he said he was checking for padding. The defendant then put the complainant over his knee and started to smack him on the bottom six times as the defendant still had his trousers on. The complainant said that each time the defendant smacked him, the defendant kept his hand on the complainant's bottom for a few seconds. He felt it wasn't right. 10. In relation to Count 5, the complainant says that, when he was 13 - 14, he was asked by the defendant to stay behind at the end of a music lesson. He was expecting it to be for disciplinary purposes. The defendant, having used a chair to wedge the door to the room shut, sat on the chair and then told the complainant to pull down his trousers and pants and bend over the defendant's knee. The complainant did as he was told. The defendant then spanked the complainant several times with his hand. On each occasion the defendant's hand lingered on the complainant's bare bottom for a second and a half or so, longer than it needed to. 11. The complainant in respect of Counts 6 - 8 states that in February 1982, when he was 14, he visited Guernsey together with other members of the school band in order to play in the Eisteddfod. The defendant, as music teacher, accompanied the band and was in charge. The defendant and the complainant shared a room with two single beds. The complainant states that, on the first night of the stay, he was in bed when the defendant came in. He got into the complainant's bed. The complainant tried to make him get out and told him several times to get out. However the defendant did not and the complainant gave up. They then began to fondle each other's private parts i.e. to masturbate each other although there was no ejaculation by either party. The same thing happened the next night although on this occasion the complainant did not put up any resistance because, he says, he was drunk. 12. After the return to Jersey following this visit, the complainant states that on a number of occasions the defendant asked the complainant to stay behind in the band room in the music block at school. In a statement in 1985, he said that this was on about five occasions, but in a more recent statement he says that it was more frequent. On each occasion there was again mutual fondling although it was always initiated by the defendant. The fondling appears to have consisted of mutual masturbation leading on some occasions

to ejaculation. 13. Counts 6 - 8 relate to these events in Jersey. Count 6 charges indecent assault and Counts 7 and 8 charge indecent assault and procuring an act of gross indecency, both relating to the same occasion. 14. Count 9 relates to a young girl. The offence is said to have occurred between 1982 and 1983 when she would have been 12 or 13. In her statement, she mentions several inappropriate incidents in the UK (groping her in public swimming pools and commenting about her breasts/bra in front of her friends) before the occasion in question. As to the incident charged, she said she was sitting on a bed when the defendant began tickling her and engaging in rough play. During this he groped her genitals and her bottom, causing her to fight him off. During the struggle she kicked him causing an injury to his toe. 15. Finally, Count 10 concerns an alleged indecent assault some 17 - 18 years or so later in 2001/2002 when the defendant was a driver. He is alleged to have assaulted the 9 year old son of a friend of the defendant, who was also a driver. The defendant was giving the boy music lessons and also drove him to see musical concerts. The complainant said that he began to feel uncomfortable in the car. Initially the defendant would just touch him on the leg or knee but gradually he began to constantly keep his hand on the complainant's leg and to stroke his leg. Because he felt uncomfortable, the complainant, whilst not telling his father why, told his father he did not wish to see the defendant any more.

- (i) Abuse of process in relation to Counts 6 - 8 and 16. The application to stay Counts 6 - 8 and Count 4 arises in the following way. 17. According to the police report prepared at the time, police officers attended the school on 7 th October, 1985, following a complaint of larceny of a micro-computer from the music block. Whilst there, the officer saw some writing on the blackboard which referred to the defendant in a derogatory manner. Following further enquiries from teaching and caretaking personnel at the school, it was established that the defendant's name had in the past been linked with a pupil who had by then left. This was the complainant in relation to Counts 6 - 8. 18. The complainant was interviewed at police headquarters at 10:05 on Wednesday 9 th October by Detective Sergeant Nimmo and Detective Constable De la Haye. He made a witness statement, the broad effect of which is summarised at paragraphs 11 -12 above. 19. At 14:30 the same day, the defendant was arrested. He was initially interviewed by DS Nimmo and DC De la Haye. It is asserted in the police report that after a brief initial denial, the defendant admitted having had a homosexual relationship with the complainant, commencing with the incident in Guernsey referred to. DC De la Haye then recorded a statement under caution from the defendant in which he admitted to the acts in Guernsey and also to having, on not more than three occasions thereafter, been alone with the complainant in the music block at the school when they had engaged in the fondling of each other's private parts. In that statement ("the 1985 statement"), as well as in effect admitting the substance of the allegations of the complainant (which now form the basis of Counts 6 - 8), the defendant volunteered that he had on an occasion spanked the complainant in Count 4 which had led to a complaint by the boy's parents and a ticking off from the headmaster. He also volunteered "I admit that I often got pleasure when caning or slipping pupils ". He also admitted to homosexual feelings. 20. The defendant was immediately suspended from his position as a teacher. DC De la Haye

subsequently prepared a police report dated 19 th October, 1985, and requested that it be forwarded to the Law Officers for a decision as to whether the defendant should be prosecuted for the indecent assaults on the complainant in Counts 6 - 8. That report was forwarded to the then Attorney General, Mr Vernon Tames under cover of a letter dated 28 th October, 1985, from Acting Detective Chief Inspector Le Brocq. Having summarised the essential nature of the report, the Acting Detective Chief Inspector said that it was quite clear that the defendant was totally unsuitable to hold a position as a school teacher or to be concerned in organisations involving young people who could be at risk and he took a serious view of this type of behaviour by persons holding a position of authority. However, he went on to say that, with the limited evidence available, particularly the reliability of the complainant and the fact that the defendant would no doubt be dismissed, he considered no useful purpose would be gained by pursuing a prosecution and recommended that perhaps the case could be dealt with by way of written caution from the Centenier. He concluded by saying that he was forwarding the report for whatever action the Attorney General may deem necessary and would await his instructions. 21. On the 30 th November, 1985, the Attorney General responded to the Acting Chief Inspector. He confirmed that he had been informed by the Education Department that the defendant had resigned from his post at the school with effect from the end of November. He said he had been anxious to ensure that non-prosecution would not create any problems for the Department of Education from a disciplinary point of view but that clearly, with the resignation, this was assured. In the circumstances he agreed with the recommendation and directed that the matter proceed by way of a written caution from a Centenier. It is apparent from other correspondence that this was subsequently administered by a Centenier. 22. In short therefore, the defendant submits that, as he was dealt with for the offences in Count 6 - 8 by way of a caution, it would be an abuse of process for him now to be prosecuted for those same offences some 30 years later. He submits that, although he was not cautioned in relation to Count 4, it was he who had in the 1985 statement volunteered the fact that he had spanked the complainant in Count 4 and accordingly the abuse of process argument also applied to that count.

- (a) The law 23. It is well established that the Court may stay criminal proceedings as an abuse of process in two very different situations. These are conveniently summarised in the headnote to the case of *Warren v AG*

[2011] JLR 424 which states:- "(1) The court had power to stay proceedings for abuse of process in two distinct categories of case: first, where it would be impossible to give an accused a fair trial; and secondly, where it offended the court's sense of justice and propriety to be asked to try an accused in the particular circumstances of the case (to avoid confusion, the issue in the second category should not be framed as whether it would be "fair" to try the accused). In the first category, if the court concluded that an accused could not receive a fair trial, it would stay the proceedings without more. No question of balancing competing interests would arise. In the second category, the court was concerned to protect the integrity of the criminal justice system. A balance had to be struck between the public interest in ensuring that those accused of serious crimes should be tried and the

competing public interest in ensuring that executive misconduct did not undermine public confidence in the criminal justice system and bring it into disrepute. ..." 24. I am concerned here with the second category, namely whether it offends the Court's sense of justice and propriety to be asked to try the defendant on Counts 6 - 8 when these were dealt with by way of caution back in 1985. 25. The courts in England and Wales have had to consider on occasion whether it would be an abuse of process if the prosecution has gone back on an assertion that there would be no prosecution. 26. I have been referred to the relevant passages from Archbold (2016 edition) at paras 4-88 to 4-95. Of particular relevance is the decision of the English Court of Appeal in *R v Abu Hamza*

[2007] 1 Cr App R 27 where, having reviewed a number of cases, the court helpfully summarised the position at paragraph 54 as follows:- "These authorities suggest that it is not likely to constitute an abuse of process to proceed with a prosecution unless (i) there has been an unequivocal representation by those with the conduct of the investigation or prosecution of a case that the defendant will not be prosecuted and (ii) the defendant has acted on that representation to his detriment. Even then, if facts come to light which were not known when the representation was made, these may justify proceeding with the prosecution despite the representation." 27. It is important to emphasise that the role of the court in deciding whether there is an abuse of process is not the same as that of the prosecution in deciding whether to reconsider a decision. Nevertheless, it is helpful to bear in mind the current Code for prosecutors in England and Wales issued by the Crown Prosecution Service which, I was informed, is also the policy applied by the Attorney General in Jersey. 28. Paragraph 10 of the Code reads as follows:- "10. Reconsidering a Prosecution Decision. 10.1 People should be able to rely on decisions taken by the CPS. Normally, if the CPS tells a suspect or defendant that there will not be a prosecution, or that the prosecution has been stopped, the case will not start again. But occasionally there are reasons why the CPS will overturn a decision not to prosecute or to deal with the case by way of an out-of-court disposal or when it will re-start the prosecution, particularly if the case is serious. 10.2 These reasons include:-

- (a) cases where a new look at the original decision shows that it was wrong and, in order to maintain confidence in the criminal justice system, a prosecution should be brought despite the earlier decision;
- (b) cases which are stopped so that more evidence which is likely to become available in the fairly near future can be collected and prepared. In this case, the prosecutor will tell the defendant that the prosecution may well start again;
- (c) cases which are stopped because of a lack of evidence but where more significant evidence is discovered later: and
- (d) cases involving a death in which a review following the findings of an inquest concludes that a prosecution should be brought, notwithstanding any earlier decision not to prosecute." 29. The defendant, with the assistance of the amicus, submits that this present case falls fairly

and squarely within the dictum of the Court of Appeal in Abu Hamza . The issuing of a caution amounted to an unequivocal representation that there would be no prosecution, the defendant has suffered prejudice in that he had lost his job and housing together with the fact that, after all this time, evidence that might have been available at the time is no longer available; and although evidence of other offences has come to light, these are not significant or material when compared with Counts 6 - 8 for which the caution was administered. The defendant also argues that the abuse of process extends to Count 4 because the complainant's name was volunteered by the defendant in the 1985 statement.

- (b) Decision 30. In my judgment, where the Attorney General directs that a matter should proceed by way of caution rather than prosecution, it would *prima facie* be an abuse of process to then bring a prosecution for the offence in question. Such a decision amounts, in my view, to an implicit and unambiguous representation that the offender will not be prosecuted. There is an important public interest in people being entitled to rely upon a decision of this nature by or on behalf of the Attorney General as head of the prosecution service. Where a significant period has expired, I would consider there to be an abuse even if there is no specific detriment to a defendant other than the lapse of time and in that sense, although the dictum in Abu Hamza is extremely helpful, it is not to be construed as a statute. The ultimate test, as the Court of Appeal itself said earlier at para 50, is whether a proposed prosecution would amount to an affront to justice. I consider that the proper starting point is that prosecution many years later for an offence previously dealt with by way of caution would normally be an affront to justice, regardless of whether the defendant had specifically acted to his detriment as a result of the caution. 31. I consider that that is so even where, as in this case, both the current Attorney General and this Court considers that the decision of Mr Tomes was clearly wrong, even in 1985. The evidence before him disclosed a serious breach of trust by a teacher and should have been prosecuted. However, the fact that the Court considers the decision to be clearly wrong does not of itself entitle the Court to say that it would not be an abuse of process for the prosecution simply to change its mind and seek to correct the error 30 years later. 32. In circumstance where some 30 years have elapsed since the caution, I would, in the absence of the matter referred to in the following paragraphs, have had no hesitation in holding that it would offend the Court's sense of justice for the defendant now to be prosecuted for the offences for which he was dealt with by way of caution back in 1985. 33. However, the position is not as straightforward as that. That is because, when he made the decision to proceed by way of caution in 1985, the Attorney General was not aware of evidence that the defendant had not only indecently assaulted the complainant in Counts 6- 8, but had also indecently assaulted the complainants in Counts 1 - 5 and a young girl (as in Count 9). It is of course not possible to know what effect such knowledge would have had on the Attorney General at the time, but in my judgment the additional alleged offences certainly add substantially to the gravity of the overall offending. I emphasise that this is not a case of the defendant having committed new offences some years after being cautioned. That would not of itself allow the prosecution to go back on their earlier decision. But, as the Court of Appeal said specifically

in the passage referred to above in Abu Hamza "If facts come to light which were not known when the representation was made, these may justify proceeding with the prosecution despite the representation." 34. The amicus argued that there had been prejudice and that this militated against permitting the prosecution to proceed. I do not accept that the loss of employment, housing etc. was a case of the defendant acting on the representation to his detriment. These were simply unfortunate consequences of the fact that he had admitted indecent assaults on the complainant in question. I accept that, as the amicus submits, there may be some prejudice to the defendant by the lapse of time in that some evidence may no longer be available e.g. the police officers' notebooks. However, this case will essentially depend upon whether the jury believes the evidence of the complainants and the jury will be directed of the possible prejudice caused to the defendant by reason of delay and to make allowances for such delay. 35. Given that it is now being alleged that the defendant did not simply indecently assault the complainant in Counts 6-8 but had at the time also indecently assaulted five other pupils, together with a young girl, I do not consider that it would be an affront to justice or offend the court's sense of justice and propriety for the defendant now to face trial on Counts 6 - 8 notwithstanding the administering of the caution. Accordingly I decline to stay the proceedings on those Counts. 36. In relation to the defendant's submission that I should also stay Count 4, I see no grounds for doing so. This alleged offence was never made the subject of a caution, nor was it apparently investigated. A passing reference to it is made in Acting Detective Inspector Le Brocq's letter to the Attorney General when he states that parents of a pupil had made a complaint about the defendant having hit their son several years ago resulting in him being cautioned by the headmaster, but there is nothing to suggest indecency in that context or that a criminal offence had been committed. There was therefore no representation (whether express or implied) and I see no reason to consider that it would be an abuse of process to proceed with the prosecution of indecent assault against the complainant in Count 4. 37. For these reasons, I decline to stay the proceedings on Count 4 or Counts 6 - 8. (ii) Is the 1985 statement admissible? 38. The prosecution propose to adduce the 1985 statement in evidence in support of Counts 6 - 8 and, so far as the reference to spanking is concerned, in support of Counts 1 - 5. The 1985 statement clearly amounts to a confession in respect of Counts 6 - 8. Thus, admissibility is therefore governed by Article 74(2) of the Police Procedures and Criminal Evidence (Jersey) Law which provides as follows:- "(2) If, in any proceedings where the prosecution proposes to give in evidence a confession made by an accused person, it is represented to the court that the confession was or may have been obtained - (a) by oppression of the person who made it; or (b) in consequence of anything said or done which was likely, in the circumstances existing at the time, to render unreliable any confession which might be made by the accused in consequence thereof, the court shall not allow the confession to be given in evidence against the accused except in so far as the prosecution proves to the court beyond reasonable doubt that the confession, notwithstanding that it may be true, was not obtained as aforesaid." 39. The defendant has asserted that he was improperly induced to sign the 1985 statement on the basis that, if he made a full confession, the matter would go no further; that he was subject to oppression because he was locked in an interview room

and told that he would not be let out until he had signed the statement; and that he had been informed by the complainant in Counts 6 - 8 that he (the complainant) was facing a charge of embezzlement and had been told that he would be dealt with leniently if he made a statement implicating the defendant. In those circumstances, I ordered a voir dire in order to hear evidence on these aspects. 40. For the purposes of the voir dire the Court was provided with various documents which were admitted by all the parties solely for the purposes of the voir dire . Those documents included the following:- (i) A witness statement ("the Witness Statement") from the complainant in Counts 6 - 8 dated 9 th October, 1985, and taken at 10:30am. (ii) The 1985 statement. This was made under caution by the defendant and is dated 9 th October, 1985. The heading is timed at 15:55 and it is then stated that the statement was begun at 15:59 and concluded at 17:05. The body of the statement records that between 16:20 and 16:24 the defendant used the toilet before returning to the interview room. Immediately following this passage there is a series of questions and answers before the statement returns to a narrative account of certain additional matters. (iii) A police report dated 19 th October, 1985, written by DC De la Haye and submitted, it would seem, to Acting Chief Inspector Le Brocq. This records that police were called to School A on Monday 7 th October to investigate a larceny of a micro-computer from the music block. Whilst examining the scene, the police officer saw something written on the blackboard which referred to the defendant and suggested that he was a homosexual. As a result of this and certain information which was given to the police, enquiries were made of teaching and caretaking personnel at the school from which it was established that the defendant's name had in the past been linked with the complainant in Counts 6-8, who had been a pupil at the school but who had now left. The report records that at 10:05 on Wednesday 9 th October DS Nimmo and DC De la Haye interviewed the complainant and the report sets out a summary of what he said, which was recorded in the Witness Statement. The report goes on to say that the defendant was arrested at 14:30 at the school by DS Nimmo and was later interviewed at Police HQ by DS Nimmo in the presence of DC De la Haye. It is said that, after a brief initial denial of the allegations made by the complainant, the defendant fully admitted to having had a homosexual relationship with the complainant, commencing with the incidents in Guernsey. The report states that a statement under caution was then recorded from the defendant starting at 15:59 and finishing at 17:05 on 9 th October. The report further records that the defendant was suspended from the school by the Education Department on 10 th October pending the outcome of the police enquiry. The report ends by requesting that it be forwarded to the Law Officers for a decision as to whether the defendant should be prosecuted for the indecent assaults on the complainant. (iv) The letter dated 28 th October, 1985, from Acting Detective Chief Inspector Le Brocq to the Attorney General Mr Vernon Tones enclosing the report from DC De la Haye as described at paragraph 19 above and Mr Tones' reply dated 30 th November, 1985. 41. The prosecution called two witnesses on the voir dire , Mr John De la Haye and Mr Martin Fitzgerald. Mr De la Haye stated that he had been a police officer for 30 years rising to the rank of Chief Inspector before retiring in December 2000. He confirmed that the Witness Statement was in his hand as was the 1985 statement. It was also his signature on both statements. He said that, after this length of

time, he could not remember anything about the investigation or the taking of statements other than that he recalled something about the investigation having started because of a comment on a blackboard at the school. What he was able to speak to was his practice. He said that, as a matter of course, he would always explain the various options to a suspect and these included saying nothing, answering questions orally, the suspect writing out a statement or the police officer writing down a statement at the suspect's dictation. If the last option was taken, it was written down contemporaneously, it was not written up later after a conversation. He explained that at that time there were two CID interview rooms which overlooked the Fire Service yard. This was on the same floor as the CID office. 42. He was asked about the specific criticisms raised by the defendant. In relation to the suggestion that the complainant had been encouraged to make a statement implicating the defendant in exchange for lenient treatment on an embezzlement charge, he said that it was inconceivable to him that he (Mr De la Haye) would have behaved in this way. He was brought up to tell the truth and he had based his police career on truthfulness and honesty. 43. As to the suggestion that the defendant had been told that, if he made a statement and resigned his job, that would be the end of the matter, Mr De la Haye said that, in his experience, this would never happen. His technique was simply to seek to establish the truth. As to the suggestion that the defendant was locked into an interview room and told that he would only be let out if he signed the statement, he asserted that this was not something he would have done and in his experience it was not a practice of the police. It was correct that the interview rooms had a lock and sometimes a suspect could be left locked in an interview room if the officers needed to seek advice or take a break for any other reason. This was because one could not have a suspect wandering around the police station. If there was a break, this would be put in the statement. In cross-examination it was suggested that the statement had been taken in parts but Mr De la Haye emphasised that any breaks etc. would be recorded. 44. Mr Martin Fitzgerald had 34 years' service in the police and had also risen to Chief Inspector before retiring in November 1998. He too had no recollection of this investigation. Indeed, the only evidence of his involvement is that he wrote a letter on 3rd February, 1986, to the Education Department in London confirming that the defendant had been dealt with by way of caution for the offences of indecent assault which were committed on the complainant. As to the suggestion that the defendant was told by a police officer that, if he made a statement and resigned his job, that would be the end of the matter, Mr Fitzgerald was adamant there was not a chance that this could have happened. It was an absolutely absurd suggestion. 45. As to the suggestion that the defendant had been locked in an interview room and told that he would remain there until he signed the voluntary statement, Mr Fitzgerald said that this too was absolute rubbish. It could not have happened. If a suspect refused to sign, this would be endorsed by the officer on the statement and that would be the end of the matter. He too agreed that suspects were locked in interview rooms as Mr De la Haye had described but they would not be kept there in order to make a statement, it simply would not happen. 46. As to the suggestion concerning things said to the complainant, he was not aware of any investigation into the complainant. 47. The defendant gave evidence. He explained that the then Director of

Education, Mr Rodhouse, wanted him (the defendant) out as a teacher. This was because of two incidents which the defendant told us about. He had been told in about 1983 that Mr Rodhouse would get him. 48. He remembered being locked in a room at the police station and being told that he was not going to leave until he had signed the statement. His recollection was that the statement was taken or prepared in draft one day and that he came back to sign it another day, which was a Sunday because he remembered that he had to play the organ at a church service. He did not accept therefore that it had all been taken and signed on the 9 th October as the 1985 statement itself suggested. He agreed that the relevant wording at the end of the statement was in his handwriting and that he had made corrections and amendments to the statement as indicated on the statement itself. He remembered being told that, if he made a convincing confession, the matter would go away. As to what the complainant said, he had met the complainant a few weeks or a month after the interview and the complainant had told him that he was in trouble over embezzlement and that he had been told that he would be dealt with leniently for the embezzlement if he made a statement against the complainant. It was put to him in cross-examination that the record of convictions of the complainant showed that the complainant had been dealt with in the Magistrate's Court for an offence of embezzlement and fined on 11 th September, 1985, i.e. nearly a month before the complainant gave his statement to the police. The defendant said that in his opinion the police were trying to get him before 11 th September at the instance of Mr Rodhouse. They were trying to build a case against him and had persuaded the complainant. He accepted that this suggestion had not been put to either of the officers. 49. I have reminded myself that it is for the prosecution to satisfy me beyond reasonable doubt that the 1985 statement was not obtained by means of oppression or in consequence of anything said or done which was likely to render any confession unreliable e.g. some inducement to make a confession. However, having had the benefit of seeing and hearing the officers and the defendant, the prosecution has satisfied me to the criminal standard that the 1985 statement was not so obtained. I would summarise my reasons as follows:- (i) I accept that if the defendant was told that he would remain locked in an interview room until he signed the voluntary statement, that would be obtaining the statement by oppression; and if he was told that if he confessed, the matter would go away or some such similar wording, that would be an inducement which would render any confession unreliable. However I am satisfied that neither of these things happened. (ii) Not surprisingly, the police officers were unable to recall the investigation or the taking of the 1985 statement or the Witness Statement. However, I accept their evidence that, by reference to their general approach to policing, they would not have countenanced locking the defendant in a room until he signed the statement or seeking to induce him to make the statement by promise of the matter going away. (iii) Conversely, I found the defendant's version of events extremely improbable. In the first place, I do not think it possible that the statement was taken in two parts as he says, with him returning the following Sunday to sign the statement, at which time he is told that he will not be let out of the room until he signs it. I accept that the defendant may well have convinced himself that this is the case but I conclude that he has become muddled because the evidence from the documents is that he

did return on 10 th October to sign a disclaimer to a gay magazine which was in the police's possession. The 1985 statement itself is quite clear on its face and states that it was taken on 9 th October between 15:59 and 17:05. The statement is additionally detailed as to timing in that it refers to a comfort break between 16:20 and 16:24 and sets out specific questions and answers which were posed and given as well as the more narrative aspects of the statement. The statement gives every appearance of being a contemporaneous document and I see no grounds for thinking that the police may have written in dates and times which were completely fictitious. I can think of no good reason why they might do this; on the contrary it would be an extremely risky thing to do for no apparent advantage. (iv) Secondly, it is clear that the defendant gave the statement careful attention. As he admitted in evidence, there are several examples of amendments which he requested and initialled. It would be very surprising if, having given the statement such careful attention, he signed a statement which either had the incorrect dates and times or had the dates and times left blank (so as to be filled in falsely at a later date by the police). (v) Thirdly, his suggestion of a widespread conspiracy whereby, at the instigation of Mr Rodhouse, the police in effect procured the complainant to make allegations against the defendant simply, presumably, to help Mr Rodhouse, is extremely far-fetched and highly unlikely. That specific suggestion was not put to the officers. (vi) Fourthly, I am satisfied that the police did not persuade the complainant to implicate the defendant in exchange for lenient treatment on the embezzlement charge. The defendant asserts that sometime after his arrest and the making of the statement, he was told by the complainant that he (the complainant) had been promised lenient treatment on an embezzlement charge if he made a statement implicating the defendant. The difficulty with this assertion is two-fold. In the first place, it is hard to see how the police could promise leniency as this was a matter entirely for the Magistrate, the matter being before the Magistrate's Court. Secondly, it is clear from the conviction record of the complainant that he was sentenced by the Magistrate's Court for the embezzlement charge on 11 th September, 1985, i.e. approximately a month before the complainant in fact made the witness statement on 9 th October. The police clearly regarded the complainant as a somewhat unsatisfactory individual. If they really wished to ensure that the complainant made a statement implicating the defendant by holding out a promise of lenient treatment, I regard it as extraordinarily unlikely that they would have allowed sentencing to go ahead and simply trusted the complainant to make the implicating statement one month later. On the contrary, if the position were as the defendant submits, I have no doubt the police would have procured the statement from the complainant before he was dealt with on the embezzlement charge so as to ensure that he did not renege on any agreement. I regard the whole suggestion of the police approaching the complainant on this basis as fanciful and I accept the version of events as appears from the police report, namely that the police only came across the complainant as a result of their visit to the school on 7 th October, the discovery of the wording on the blackboard and their subsequent enquiries from staff at the school which identified the complainant. It is of course not impossible that the complainant tried to minimise his responsibility in the defendant's eyes by blaming the police but I am satisfied that, even if he said this, there was no truth in it. 50. In summary the prosecution

has satisfied me beyond reasonable doubt that none of the grounds for doubting the confession in the 1985 statement listed in Article 74 of the 2003 Law are present. I have considered whether there is any other reason for concluding that it would be unfair to admit the 1985 statement such that I should exclude it under Article 76 but I do find that any such reason is present. I therefore rule that the 1985 statement may be admitted in evidence. (iii) Are all the counts properly joined in the same indictment? 51. Rule 3 of the Indictments (Jersey) Rules provides:- "Charges for any offences, whether "crimes", "délits" or "infractions", may be joined in the same indictment if those charges are founded on the same facts or form or are part of a series of offences of the same or a similar character." 52. The meaning of the expression '...a series of offences of...a similar character' has been considered in a number of cases in England and Wales which have been applied in this jurisdiction (see for example AG v P

[2013] 1 JLR 45). The position is helpfully set out in Archbold (2016 edition) at para 1 - 239 as follows:- "In *Ludlow v Metropolitan Police Commissioner* ... the House of Lords, having considered the previous law and practice held, in respect of Rule 3 of the Indictment Rule of 1915 ... that (a) two offences can constitute a series, and (b) both the law and the facts should be taken into account when deciding whether offences are similar or dissimilar in character. They concluded that, in respect of the limb of the rule then under consideration, there must be a series of offences of a similar character; for this purpose there must be some nexus between the offences; nexus is a feature of similarity which in all the circumstances of the case enables the offences to be described as a series. ... Their Lordships also cited, with implicit approval, the dictum in *Kray* , ante, that the operation of the relevant part of the Rule is not restricted to cases where the evidence on one charge is admissible on the other(s) and expressly approved the dictum that the Rule should not be given an unduly restricted meaning." 53. I have been referred to a number of cases including *R v Baird*

(1993) 97 Cr App R 308, *R v O'Brien* [2000] WL 191258, *R v Blackstock* 70 Cr App R 34 and *AG v Channing* [2004] JLR 265 . I do not propose to refer specifically to these cases but I have borne them in mind. In particular, it is clear that, where no nexus based on mutual admissibility of evidence exists, time is a relevant factor but is not determinative; thus a sufficient nexus may exist between offences alleged to have taken place many years apart but the greater the interval, the clearer must be the nexus. 54. In considering both the question of nexus and that of severance, it is relevant to consider the cross-admissibility of evidence in relation to different charges i.e. whether there is similar fact evidence. In that respect, I bear in mind the test for similar fact evidence laid down in this jurisdiction in *U v AG*

[2012] (1) JLR 349 which in turn applies the English case of *DPP v P*

(1991) 2 AC 447. In the case of *U* , *Nutting JA* said this at para 13:- "None of this is controversial or new. It is well established that similar fact evidence is admissible if it is relevant to an issue before the court. e.g. because it tends to prove one of the elements in the alleged offence,

or to rebut a defence which would otherwise be open to the accused The question of coincidence lies at the heart of the analysis. Evidence is likely to be admissible if an attempt to explain it away by coincidence would be an affront to common-sense, or would be against all probabilities, or would only be accepted as an explanation by a 'an ultra-cautious jury.'" 55. Applying the above principles to the facts of this case, I conclude as follows:- (i) Counts 1

- 5 are correctly joined in the same indictment and the evidence on each is cross-admissible in relation to the others. There is on these counts a very considerable similarity and a very clear nexus. Each of them is alleged to have been committed on a pupil where the defendant was a teacher. Each offence occurred in the context of the defendant administering or being expected to administer corporal punishment and each involves alleged indecency in that context. Although the exact nature of the indecency varies from count to count, this is not in my judgment a significant difference because they all occurred in the same context. Furthermore, the offences are all alleged to have occurred in 1979/1980. (ii) Counts 6 - 8 are also correctly joined in the same indictment; indeed, as with Counts 1 - 5, Advocate Steenson as amicus did not feel he could properly contend otherwise. These offences are of course not identical to Counts 1 - 5. They did not take place in the context of spanking and there was a greater degree of indecency, namely mutual fondling and masturbation. But there is in my judgment ample nexus to justify joinder. Like Counts 1 - 5, Counts 6 - 8 involved a complainant who was a boy pupil at the school of similar age to the complainants in the other counts, the relationship was that of teacher and pupil, the offending took place in the music block at the school; and it was reasonably close in time to Counts 1 - 5 in that it occurred in 1982/3. (iii) Count 9 is more difficult. Unlike all the remaining counts, it involved a female victim, and did not involve a teacher/pupil relationship. As against that, the offence took place during the same period as Counts 5 - 8, namely 1982/3, there was a position of authority between the victim and the defendant, and although not the same, the physical contact had certain similarities in that the defendant groped not only the complainant's genital area but also her bottom (which was his main area of interest in Counts 1 - 5). On balance I conclude however that, on the basis of cases such as O'Brien , I cannot safely conclude that Count 9 forms part of a series of offences of similar character. It is not therefore properly joined in the Indictment. (iv) I do not consider that Count 10 is properly joined in the same Indictment. Although it relates to a boy, he is younger (9) than in all the other cases, the offending occurred 17 or 18 years later and the nature of the alleged indecency is different. Accordingly I do not consider there is sufficient nexus to justify joinder. (iv) Severance 56. Having ruled that Counts 1-8 are properly joined in the same Indictment, I must then consider whether any of them should be severed i.e. tried separately. That is because Rule 6(2) of the Indictment Rules provides:- "Where, before trial, or at any stage of a trial, the Court is of opinion that an accused person may be prejudiced or embarrassed in the accused's defence by reason of being charged with more than one offence in the same indictment, or that for any other reason it is desirable to direct that the person should be tried separately for any one or more offences charged in an

indictment, the Court may order a separate trial of any count or counts of such indictment."

57. Again, I have been referred to a number of English cases where the relevant rule is similar. The leading case is *R v Christou*

- [1997] AC 117 where the House of Lords emphasised that, even where the defendant was charged with sexual offences where the evidence of one complainant was not so related to that of the other as to render it admissible on the charges covering that other complainant, a judge has a statutory discretion to order that all charges should be tried together. The House of Lords approved a passage from the judgment of Lord Lane CJ in *R v Cannan*
- (1990) 92 Cr App R 60 at 23 where he said:- "It may well be that often the judge in sexual cases will order severance, as is clear from the various cases which we have already taken the liberty of citing ... But the fact remains that the Indictments Act 1915 gives the judge a discretion, and it is a well-known fact, and a well-known principle, as Salmon LJ in his usual clear language sets out in the case of *Flack* [1969] 1 WLR 937, that that is not a matter with which this court will interfere, unless it is shown that the judge has failed to exercise his discretion upon the usual and proper principles, namely, taking into account all things he should, and not taking into account anything which he should not." 58. Lord Taylor in *Christou* went on to say at 129:- "Lord Lane CJ in the quoted passage, refrained from specifying the factors a judge should consider when 'taking into account all things he should'. They will vary from case to case, but the essential criterion is the achievement of a fair resolution of the issues. That requires fairness to the accused but also to the prosecution and those involved in it. Some, by no means an exhaustive list, of the factors which may need to be considered are:- how discrete or inter-related are the facts giving rise to the counts; the impact of ordering two or more trials on the defendant and his family, on the victims and their families, on press publicity; and importantly, whether directions the judge can give to the jury will suffice to secure a fair trial if the counts are tried together. In regard to that last factor, jury trials are conducted on the basis that the judge's directions of law are to be applied faithfully. Experience shows, as for example in *R v Blackstock* ... and in the instant case, that juries, where counts are jointly tried, do follow the judge's directions and consider the counts separately." 59. In the same case Lord Hope emphasised the Scottish experience. Having stated at 131 that the practice of trying all outstanding charges against the accused on a single indictment had been established for a long time and was seen to be in the public interest as well as that of the accused in order that justice may be done expeditiously, he went on to say:- "It is inevitable, if a series of unconnected charges are allowed to go to trial at the same time, that evidence will be led in regard to one charge which is inadmissible in regard to another. A material risk of real prejudice to the accused is not thought however to arise merely because the charges relate to different kinds of crime committed at different times in different places and under different circumstances. Experience has shown that under proper directions juries are well able to consider each charge in an indictment separately. Their verdicts demonstrate time and again that they have done so. In practice motions for separation of charges are granted only in very clear cases, where fairness to the accused makes this necessary." He

went on to say that even in cases of child sexual abuse, experience had shown that juries follow the judge's directions and are well able to consider the charges separately. 60. In this jurisdiction, the Court of Appeal has considered the same topic in *H v AG*

[2013] (1) JLR 210 where at para 28 Calvert-Smith JA said this:- "28 From those cases, we have drawn the following principles:

- (i) The Indictment Rules in England and Wales have, for nearly a century, given courts the right to try multiple counts in the same indictment if "based on the same or similar facts or are part of a series of offences of the same or of a similar character." The same rule is to be found at r.3 of the Jersey Indictments Rules 1972. (ii) Over the same period the practice has developed so that indictments routinely contain counts in respect of which the evidence is separate and mutually inadmissible but which are conveniently tried together. (iii) ... (iv) The obiter dictum of Glidewell, LJ in *R v Wilmot* 89 Cr App R at 345):- 'theoretically, even if evidence in relation to one offence is inadmissible in relation to another, the judge has a discretion nevertheless not to sever the indictment, in other words, to allow the counts alleging the separate offences to be tried together. Clearly such a course falls within rule 9 of the Indictments Rules 1971. But in our view where evidence in relation to one matter is clearly inadmissible to prove another, it is normally right in such circumstances to sever the trial of the different offences'

- was not being applied in English and Welsh courts at the time and has not been since. For instance, offences of dishonesty on the one hand or violence on the other are regularly charged and tried in the same indictment without objection at trial or appeal to the Court of Appeal Criminal Division. Appeals brought in this jurisdiction - which follows the English and Welsh practice in this instance - solely on the basis of this dictum are therefore unlikely to succeed." 61. Applying these principles to the facts of this case, I conclude as follows:- (i) As indicated as para 55(i), I consider that the evidence in relation to Counts 1-5 is cross-admissible. I see no ground for thinking that it is necessary to sever the trial of these counts and Advocate Steenson did not contend to the contrary. The defendant was content to rely upon the submissions of the amicus in relation to both joinder and severance. (ii) The next decision is whether Counts 6-8 should be tried separately from Counts 1-5. Whether the evidence in relation to Counts 1-5 is admissible in relation to Counts 6-8 and vice versa is doubtful. Crown Advocate Yates was inclined to think that there was no cross-admissibility although Advocate Steenson thought that, depending upon the nature of the defence, there might be some circumstances in which there would be. At present I am not persuaded that there would be any cross-admissibility and I reach my decision on severance on the assumption that there is none. Nevertheless, even on this assumption, I conclude that Counts 6-8 should not be severed from Counts 1-5. Although there is no cross-admissibility, there is a similar general background in that all the complainants were pupils at the school where the defendant was a teacher and certain parts of the 1985 statement are relevant to Counts 1-5. In addition, I think it would be undesirable to put all the parties through two trials (in addition to trials of Counts 9 and 10). As Lord Taylor and Lord Hope made clear in

Christou , decisions as to severance require fairness not only to the accused but also to the prosecution and those involved in it. I think it fair to the complainants that the trial should take place as soon as possible so that they can all give their evidence and put this matter behind them as soon as possible. The same applies to the defendant; if there is severance there will be at least two trials and the matter will hang over him for a considerable period. Furthermore, Jersey is a small jurisdiction and, even with reporting restrictions, there is always a risk that details (perhaps inaccurate) of the first trial will leak out. It seems to me preferable that the whole position should be put fairly and squarely before the jury who can deal with the matter simply on the evidence before them and in accordance with the judge's directions. Most relevantly, assuming no cross-admissibility, the jury will be directed to consider Counts 6-8 quite separately from the remaining Counts. As indicated by both Lord Taylor and Lord Hope in Christou , I am confident that the jury will loyally follow such direction and consider the Counts separately. In all the circumstances I do not think the defendant would be prejudiced by all the Counts being tried together and I am satisfied that it would be in the interests of justice to do so. I therefore reject the application that Counts 6-8 should be severed from Counts 1-5.

- (v) Is evidence of images of spanking admissible? 62. As already described at paragraphs 5 to 10 above, Counts 1 - 5 involve alleged indecency in the context of an actual or proposed spanking by the defendant of a boy pupil. 63. When the defendant was arrested in August 2015, his laptop was examined. It disclosed the existence of some 3,553 adult pornographic images, of which 1,805 (174 unique) showed spanking type images, the vast majority of them involved young men being spanked. It follows that approximately 50% of the images concerned were of spanking. A number of mobile phones and sim cards were also examined. These showed a total of 30,018 images of which 6,533 (approximately 18%) were of a spanking nature. The majority of these tended to show an older adult male spanking a younger male and some appeared to be posed in a school or student/teacher environment. 64. The prosecution seek to adduce evidence of these findings together with what is said to be a representative sample of the spanking images found. I have been shown that sample. 65. Crown Advocate Yates submits that the evidence of what was found on the laptop and the telephones is probative of the defendant's guilt on Counts 1-5 and therefore relevant. Was it really likely that five complainants would falsely accuse the defendant of assaults in the context of spanking when, unknown to them, he does have in fact have an interest in just that sort of behaviour as shown by the computer images? 66. Advocate Steenson, as amicus , on the other hand queried whether the evidence was not simply probative of propensity and therefore inadmissible. When pressed, he accepted that it probably was probative for the reason put forward by the prosecution, but it was highly prejudicial. Were he defending, he would argue strongly for its exclusion on the basis that its prejudicial effect outweighed its probative value. 67. The defendant submitted that the evidence should be excluded. In particular, he submitted that evidence that he had an interest in spanking in recent years did not show that he had such an interest 30 years ago in the 1970s and early 1980s. 68. The issue of admitting computer images or searches on a computer in relation to a contact sexual

offence came before the Court of Appeal in *A v AG*

- [2012] JCA 104 . In that case, the appellant was convicted of an offence of rape and an offence of gross indecency against his adopted daughter when she was 15. The prosecution had been permitted to adduce evidence of internet searches by the appellant for material relating to incest and to underage sexual images of children. 69. The Court of Appeal dismissed his appeal against conviction which was based upon the contention that such evidence had been wrongly admitted. In doing so the Court of Appeal reviewed the applicable principles. At paragraph 31 of the judgment, Steel JA said this:- "... we accept that we should apply this test to the material before us:- (1) where evidence is tendered solely to establish propensity to commit a crime it is not admissible; (2) where the evidence achieves or is capable of achieving more i.e. repetitive situations or highly unlikely co-incidences then it becomes relevant and admissible; (3) there is a balancing exercise required of the judge - is the probative force in support of the allegation sufficiently great to make it just to admit the evidence." 70. Steel JA went on at para 35 to quote with approval from the judgment of Latham LJ in the English Court of Appeal in *R v Grey*
- [2002] EWCA Crim 1047 where at paragraph 12 he said:- "The issue before the jury, as we have identified it from the judge's summing up, was one in which the jury was required to come to a conclusion about the credibility of the account given by the complainant on the one hand and the appellant on the other. It seems to us that in determining that issue it was relevant to the jury's considerations that pornographic material of a type similar to the material found in the possession of this appellant was used according to the complainant to stimulate sexual activity and that he was given a sexual aid which was similar to a sexual aid found in the possession of the appellant. This was material which was capable of helping the jury to decide whether or not the complainant was telling the truth about what the complainant did in the hotel room that day. In our judgment it accordingly went to an issue in the case. It was not evidence that was admitted simply for the purpose of establishing propensity; and the jury were directed in forceful terms by the judge not to allow themselves to use the material merely as evidence of propensity. Given that it was, in our judgment, admissible, it seems to us that the way the material was handled ... was such as to justify the judge in concluding that it was proper, in the exercise of his discretion, to permit it to go before the jury as being of sufficient probative value to outweigh the prejudicial effect that undoubtedly such material would have had." 71. The Court of Appeal went on in *A* to quote with approval from the 2012 edition of Archbold of para 13-62 as follows:- "The assertion that the same principle applies to all cases regardless of the nature of the defence is not to assert that the application of the principle will lead to the same conclusion in all such cases. The probative value of the disputed evidence has to be assessed in the light of all the evidence and the issues in the case; to be admissible it has to be so cogent that if added to all the other evidence, only an ultra-cautious jury would acquit in the face of it. If a complainant makes an allegation of a sexual offence against a person previously unknown to him, and the defence is one of complete denial, it is submitted that evidence of the finding in the accused's possession of

a magazine depicting the commission of acts of exactly the same type as those alleged would be admissible. What are the chances of the complainants making an allegation of a serious sexual offence against a complete stranger, and that person turning out to have an interest in exactly the type of conduct of which he is accused? The practical application of the principle is unlikely ever to be so straightforward. In the majority of cases, the allegation is against someone (headmaster, scout leader, swimming instructor, etc.) who was known to the accuser, and the judge will no doubt bear in mind that if a false accusation is to be made, it is perhaps more likely to be made against a person known (or believed) to have a homosexual or paedophilic propensity; if the accused has been picked on for this reason, there would, of course, be no coincidence factor at all in the discovery of incriminating magazines or articles in his possession (aliter, of course if the items were referable to the particular allegation)." 72. The fact that it is not necessary to wait for a specific defence before deciding on the admissibility of such evidence was emphasised (in the context of similar fact evidence) by the Court of Appeal in *U v AG* (supra) where Nutting JA said this at paragraph 14:- "It is worth emphasising that, in order to admit similar fact evidence, it is not necessary for the prosecution to wait until a specific defence has been set up. It is sufficient if the defence is reasonably available. ...nevertheless, the prosecution must not be allowed to adduce prejudicial evidence by imputing to the accused an intention to set up some improbable or fanciful defence...." 73. It is not at this stage known exactly what defence the defendant will be putting forward. However those which can be anticipated as being reasonably available in relation to each of Counts 1-5 are either a denial of the whole incident, a denial of any specific indecent touching or a denial that the spanking was indecent. 74. In my judgment, whichever of the above defences may emerge, the evidence of what was found on the computer and telephones is strongly probative. To adapt the wording from the extract in *Archbold* referred to above, what are the chances of the complainants alleging indecent assaults in the course of a spanking by the defendant when, unknown to them, the defendant has, according to the images on the laptop and phones, an interest in spanking i.e. just the sort of conduct which they allege. To adapt the wording of Nutting JA in *U* at para 13, such evidence is in my judgment admissible because an attempt to explain it away by co-incidence would be an affront to common sense or against all probabilities. 75. I take into account of course that the allegations in this case are not against a complete stranger; they are against their teacher and certainly one of them indicates in his statement that he does recall there having been rumours about the defendant being gay. However, the statements explain how each of them has come to make a statement and there is no evidence of any collusion, nor is there any evidence of any of them being aware of any fetish in relation to spanking. 76. In my judgment, the evidence does not simply show propensity; it is probative of the evidence of the complainants because of the unlikely co-incidence of the defendant having an interest in spanking and then allegedly committing these assaults in the context of the spanking of the complainants. I note the defendant's point concerning the fact that his interest in spanking is only shown in relation to the comparatively recent past whereas these offences took place a long time

ago, but that, it seems to me, is a matter for the jury to assess; it does not go to the probative value of the evidence. 77. Having decided that the evidence is probative, I must of course consider the prejudicial effect as submitted by the amicus . I accept that there will be prejudice in the sense that the admission of such evidence may make it more likely that a conviction will result but this is because of its probative value. I do not consider that the prejudicial effect outweighs the probative value and I decline in my discretion to refuse to admit the evidence. (vi) Is evidence of conduct in Guernsey admissible re Counts 6 - 8? 78. The evidence which the Crown seek to lead in relation to events in Guernsey is set out at para 11 above. 79. Crown Advocate Yates submits that the evidence as to what happened in Guernsey is necessary by way of essential background evidence. The principles governing the admissibility of such evidence are well established. In *R v Pettman* 2nd May 1985, Purchas LJ in the English Court of Appeal said this:- "Where it is necessary to place before the jury evidence of part of a continual background or history relevant to the offence charged in the indictment, and without the totality of which the account placed before the jury would be incomplete, then the fact that the whole account involves including evidence establishing the commission of an offence with which the accused is not charged is not of itself a ground for excluding the evidence." 80. The law in Jersey is to like effect. Thus the headnote to the decision in *Glover v AG*

[2008] JLR N 30 reads:- "As a general rule, the Crown was obliged to call all relevant evidence to support its case, including background evidence of any kind (e.g. evidence establishing the commission of a further criminal offence with which the accused was not charged) if the absence of such evidence would result in a deficient or distorted picture being presented to the Court (*R v Pettman* ... applied). The court had discretion to exclude such evidence notwithstanding its admissibility, if its prejudicial effect outweighed its probative value (*R v Fulcher* ... applied)." 81. The Court of Appeal repeated this approach in *U v AG*

[2012] (1) JLR 349 and at para 41 specifically approved this extract from an article by Professor Birch in *Commentary on R v Stevens* ([1995] *Criminal Law Review* at 651) where, in distinguishing between similar fact evidence and background evidence, she said this in relation to background evidence:- "... background evidence, on the other hand, has a far less dramatic but no less important claim to be received. It is admitted in order to put the jury in the general picture about the characters involved in the action and the run-up to the alleged offence. It may or may not involve prior offences; if it does so this is because the account would be, as Purchas LJ says [in *R v Pettman*] 'incomplete or incoherent' without them. It is not so much that it would be an affront to common sense to exclude the evidence, rather that it is helpful to have it and difficult for the jury to do their job if events are viewed in total isolation from their history." 82. I am in no doubt that the evidence as to what occurred in Guernsey is essential background evidence and is relevant to Counts 6-8. It is necessary to in order to explain why the defendant may have asked the complainant to stay behind in the music room and why the indecency between them then took place. The alleged conduct cannot be properly assessed or understood without knowing what is said to have happened in Guernsey, which was the first occasion, of any indecency occurring. I

do not see how the jury could properly make sense of what is said to have occurred in the music room if they were unaware of the incident shortly beforehand in Guernsey. The evidence as what happened in Guernsey is relevant and therefore admissible. 83. Having decided that it is admissible, I must of course consider whether in my discretion I should nevertheless exclude it because its probative effect is outweighed by its prejudicial effect. I consider its probative effect to be high for the reasons I have just given, namely that what is said to have occurred in the music room can only properly be understood against what is said to have occurred in Guernsey. As against that, whilst of course there is some prejudicial effect in hearing of previous occasions of indecent assault against the complainant - including his expressed reluctance on the first occasion - this is not, for example, a case where, as essential background, evidence is adduced of an offence against some other person. The evidence of what occurred in Guernsey will be dependent upon the jury's assessment of the complainant in the same way as in relation to Counts 6-8. Accordingly, in my discretion, I do not consider that the prejudicial effect outweighs the probative value. 84. I hold therefore that the prosecution may adduce the evidence of what occurred in Guernsey as evidence relating to Counts 6- 8. (vii) Evidence of subsequent conduct in Reading concerning the complainant in Count 5 85. The nature of the allegation in respect of Count 5 is set out at para 10 above. 86. In his witness statement, the complainant in respect of this Count says that, when he was 16 and after he had left school, the defendant invited him to join the school band at Reading. They stayed at a house and had to sleep in the lounge. He says the defendant slept on a couch and he had a mattress on the floor. He recalls that, after he had gone to bed, he felt the defendant's hand on his right hip area and sliding over towards his genitals. He brushed the defendant's hand away and the defendant said 'sorry, I just wanted to want to see' . 87. The prosecution seek to adduce this evidence as background evidence, alternatively as similar fact evidence. 88. I do not consider that it is essential background evidence. The evidence as to what occurred in relation to Count 5 makes perfect sense on its own. It occurred well before the incident in Reading and the evidence of the complainant in relation to Count 5 is perfectly intelligible without reference to something that happened some years afterwards. 89. As to whether it is admissible as similar fact evidence, I do not consider that there is such a similarity between these two incidents that an attempt to explain it away by co-incidence would be in an affront to common sense or against all probabilities. I therefore rule against admitting the evidence of what occurred in Reading.

Conclusion

90. In summary I rule as follows:- (i) I decline to stay Count 4 or Counts 6-8 as an abuse of process. (ii) The 1985 statement may be admitted in evidence. (iii) Counts 1-8 are properly joined in the indictment. Counts 9 and 10 are not. (iv) Counts 1-8 may be tried together and I decline to sever the Indictment. (v) The evidence of the images of spanking found on the laptop and phones may be admitted. (vi) Evidence of the conduct in Guernsey may be admitted in relation to Count 6-8. (vii) Evidence of the conduct in Reading concerning the

complainant in Count 5 is not admissible. Authorities Warren v AG

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[2013] (1) JLR 210. A v AG

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