

JERSEY / JUDGMENT

AG v Baska [2022] JRC 059 (03 March 2022)

[2022] JRC 059

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JUDGMENT

THE DEPUTY BAILIFF: 1. On 8 th December 2021, I sat to consider bad character applications made by the Crown and defence respectively in this case. Most matters were resolved by agreement between the parties, including submitting provisionally agreed admissions for my consideration by 5pm on the Friday before the trial. However, there were certain matters upon which the parties said that they would appreciate a judgment from the Court. Bad character evidence - general 2. First, by way of introduction, it is appropriate to make some general comments about bad character evidence. Bad character evidence can be admitted by way of agreement between the parties, pursuant to Article 82E(1)(a) of the Police Procedures and Criminal Evidence (Jersey) Law 2003 ("the Law"). However, as the Crown Court Compendium makes clear, and bearing in mind the similarity of the relevant legislation in England and Jersey, it is appropriate and frequently essential to consider English practice and procedure in relation to these provisions, it is noted that 'caution is required in admitting evidence on this basis. Further the Compendium says that it is: "...wise for the judge to seek clarification from the advocates as to what is agreed, and for what purpose, so that the judge can consider how best to direct the jury in summing up." 3. Accordingly, it is essential that in every case advocates draw to the attention of the judge before trial any agreed bad character evidence. The Court has a duty in relation to admissions in relation to bad character (and, indeed, all admissions) to ensure that only relevant evidence goes to the jury and that such evidence is - per the Compendium; 'presented in the shortest and clearest way'. 4. So, if the parties have agreed that bad character evidence should be adduced which is not relevant then the judge should direct that the draft admissions be amended before they are placed before the jury. In every case, the advocates should draw to the attention of the trial judge the admissions that it is proposed to be placed before the jury well before they are read to the jury (or Jurats) or placed in the jury's (or Jurat's) bundle. This case 5. This case concerns allegations of grave and criminal assault against the Defendant. The Defendant and the complainant were in a relationship for several years. They have a child now aged four. The relationship was an uneasy one, described by the complainant as 'toxic in her witness statement. After the relationship broke down in April 2021, it is alleged that on two occasions in June 2021 the Defendant kicked the complainant in the stomach in her home (giving rise to the two allegations of grave and criminal assault) and, subsequently attempted to persuade her to withdraw her evidence which gives rise to a count of attempting to pervert the course of justice. 6. The Defendant made " no comment " in interview in relation to these

allegations, but in his defence case statement gives a lengthy account of incidents in the relationship beginning in December 2020 but not before, although the relationship began in 2016. In summary, he says that in December 2020, he heard that the complainant had been unfaithful to him and their relationship over the last few months was characterised by a great deal of disharmony including assaults on the Defendant by the complainant and false allegations made by the complainant. He said the allegations of assault made against him were false and that the incidents did not occur. On both occasions when offences of grave and criminal assault are alleged, the Defendant spent evenings with the complainant at her home and there was no violence offered by the Defendant. He said that owing to the number of police attendances at the complainant's home due to disturbances between the complainant and the Defendant and others, the landlord, Andium Homes, was taking eviction proceedings against the complainant and, owing to the unsettled nature of the complainant's life, she was the subject of proceedings by the Children's Service in relation to their child. He says that he believed that the complainant was trying to blame him by making these allegations in order to avoid action being taken against her by the Children's Service and/or Andium Homes, and to seek revenge and punish him for being in a new relationship with a third party. He accepts that some of the incidents at the complainant's home were 'mutual arguments of which I accept partial blame', but the three most recent matters that were the subject of the counts on the indictment were not. 7. It is appropriate to first consider the Crown's application to adduce bad character evidence, even though that was not objected to by the Defendant and will be dealt with by way of agreed admissions. The Crown's application 8. By way of background, the evidence of the complainant (which was undisputed to this extent) was that she and the Defendant were in a relationship from 2016 onwards, i.e., in excess of four years prior to the alleged assaults. Her final witness statement dated 2 nd December 2021 set out the history of their relationship and identified difficulties from 2019 onwards, including an allegation that the Defendant broke her finger in September 2019 requiring hospital treatment, and threw a plate of food and the complainant's telephone at her head before throwing her telephone out of the window when he was drunk in December 2020. She says that both were habitual users of cocaine. Nonetheless, the Crown restricted itself to applying to adduce four specific incidents which occurred within the six month period prior to the alleged assaults. 9. As to the nature of these incidents, I directed both parties to agree succinct admissions in relation to all four incidents. This they did and these were put before the jury in the following terms: "41. On 13th December 2020, the Defendant called the police to tell them that a 'smackhead' was in the Complainant's property. The police telephoned the - Complainant and confirmed that no-one was inside the property and that the Complainant and her child were safe and well. The Defendant was outside the property trying to get into it. He was then seen by another police unit to be stumbling away from the property. No charges were brought in relation to this incident. 42. On 7th March 2021, the police were called by a member of the public to a disturbance which was taking place at the property. The Complainant alleged that the Defendant has caused damage to items in the kitchen and further, that he had assaulted her by pushing her. There were no visible injuries on the Complainant and the Defendant had left the property. No charges were brought in relation to this incident.

43. On 27th March 2021, the Complainant's father telephoned the police to report that the Defendant was in the property. The police attended at the property, to find the Defendant, in a state of intoxication, sitting with their child. The Defendant left the property and no charges were brought against him.
44. On 14th May 2021, the Complainant called the police, alleging that the Defendant had cut her hair whilst she was asleep and then grabbed her arms. The Complainant initially offered little information as to how her hair came to be cut off and later told officers she couldn't remember but recalls waking up to her hair being on the floor and the Defendant filming her. The Defendant had marks to his face but didn't make any allegations. Upon arrest and caution, the Defendant was compliant and stated "I knew this would happen as the bloke always gets arrested, I've done nothing wrong". He was interviewed and no charges were brought against him. The Defendant provided officers with video footage taken on his mobile phone which showed the Complainant cutting her own hair.
45. Officers who attended at the Complainant's address noted that she had marks on her left arm which appeared to be bruising and fresh scratches. The Defendant was examined by Dr Evans who recorded abrasions to his face, linear abrasions to his neck, bruises and abrasions to the front of his body and right arm, abrasions and linear abrasions to the left side of his back and abrasions and bruising ('bite') on his right thigh." 10. These incidents were referred to in the admissions under the title "Previous matters". 11. The Crown sought to admit this evidence pursuant to Article 82E(1)(c) of the Law. This provides: "82E Defendant's bad character - admissibility of evidence
- (1) In criminal proceedings, evidence of the defendant's bad character is admissible if, but only if - ...
- (c) it is important explanatory evidence; ...
- (5) For the purposes of paragraph (1)(c), evidence is important explanatory evidence if -
- (a) without it, the court or jury would find it impossible or difficult properly to understand other evidence in the case; and
- (b) its value for understanding the case as a whole is substantial." 12. The Crown argued that taken in isolation the incidents on 15 th and 17 th June 2021 giving rise to two counts of grave and criminal assault could not be properly understood unless the jury knew of the background of what the Crown described as a "volatile relationship with incidents where the Defendant had chosen to ignore orders made to prevent him attending the home address of the complainant ". At trial, the Crown portrayed the Defendant as a controlling figure who exerted his dominion over a vulnerable complainant, with all three counts on the indictment being representative of the relationship between them. 13. The defence did not oppose the Crown's application. Nonetheless, it was necessary for the Court to be satisfied that the evidence was admissible on the basis contended for by the Crown. Although it would certainly be possible for the jury to understand the evidence without reference to the explanatory background evidence, I accept that it would be difficult to do so as it was

important for the jury to appreciate the existing dynamic between the complainant and the Defendant as illustrated by recent encounters. Those incidents were sufficiently proximate in time to the alleged assaults for it to be appropriate for the jury to hear about them and as the admissions were made in a relatively narrow compass there was no real opportunity for such evidence to distract the jury from their principal task, namely identifying whether or not they were sure that the Crown had proved its case on the three counts on the indictment. 14. The final incident on 14 th May 2021 referred to in paragraph 44 and 45 of the extract from the agreed admissions above, was also subject to the defence application that it be admitted pursuant to their application under Article 82J of the Law which I will now consider. 15. I note that the Crown did not seek to adduce the evidence of the previous incidents as going to propensity, i.e., the likelihood that the Defendant carried out the alleged assaults. Nor did the Crown seek to adduce any evidence of the Defendant's previous convictions, which were reasonably extensive and included convictions for dishonesty and assault, although not since 2015. The defence application 16. The Defendant's application was to adduce evidence in respect of the complainant's character under Article 82J of the Law. 17. The relevant provision is as follows: "82J Non-defendant's bad character (1) In criminal proceedings evidence of the bad character of a person other than the defendant is admissible if and only if -

- (a) it is important explanatory evidence;
- (b) it has substantial probative value in relation to a matter which - (i) is a matter in issue in the proceedings, and (ii) is of substantial importance in the context of the case as a whole; or
- (c) all parties to the proceedings agree to the evidence being admissible. (2) For the purposes of paragraph (1)(a) evidence is important explanatory evidence if - (a) without it, the court or jury would find it impossible or difficult, properly to understand other evidence in the case; and (b) its value for understanding the case as a whole is substantial. (3) In assessing the probative value of evidence for the purposes of paragraph (1)(b) the court must have regard to the following factors (and to any others it considers relevant) - (a) the nature and number of the events, or other things, to which the evidence relates; (b) when those events or things are alleged to have happened or existed; (c) where - (i) the evidence is evidence of a person's misconduct, and (ii) it is suggested that the evidence has probative value by reason of similarity between that misconduct and other alleged misconduct, (d) where - (i) the evidence is evidence of a person's misconduct, (ii) it is suggested that that person is also responsible for the misconduct charged, and (iii) the identity of the person responsible for the misconduct charged is disputed, the extent to which the evidence shows or tends to show that the same person was responsible each time. (4) Except where paragraph (1)(c) applies, evidence of the bad character of a person other than the defendant must not be given without leave of the court." 18. The approach to applications under Article 82J was considered in AG-v-PMB ([2021] JRC 335) where the Court said: "30. After much debate about the extent to which bad character evidence in respect of a non-defendant witness is admissible, particularly where the issue is the credibility of the witness and where the

convictions are not merely convictions for dishonesty, the current approach which prevails in England and Wales was settled by the English Court of Appeal in *R -v- Brewster and Cromwell*

[2010] 2 Cr App R 20 . In that case the defendants were convicted of kidnapping, the complainant alleging that she had been kidnaped by the defendants. Her creditworthiness was a matter in issue in the proceedings and the defence unsuccessfully applied to cross-examine her upon her previous convictions for burglary, theft, and manslaughter, all of which she had admitted. The alleged kidnapping took place in early 2009 and the offences committed by the complainant occurred over the previous nine years. Of particular concern to the defence was the conviction for manslaughter, owing to the circumstances in which that offence was committed. That offence took place approximately five years prior to the alleged kidnapping. At paragraph 21 of the judgment of the Court of Appeal Pitchford, LJ, giving the judgment of the court said: " 22. It seems to us that the trial judge's task will be to evaluate the evidence of bad character which it is proposed to admit for the purpose of deciding whether it is reasonably capable of assisting a fair-minded jury to reach a view whether the witness's evidence is, or is not, worthy of belief. Only then can it properly be said that the evidence is of substantial probative value on the issue of creditworthiness. In reaching this view, with respect to the court in *S (Andrew)* , we agree with the observations of Hughes L. J. in *Stephenson* . It does not seem to us that the words "substantial probative value", in their s.100(1)(b) , context require the applicant to establish that the bad character relied on amounts to proof of a lack of credibility of the witness when credibility is an issue of substantial importance, or that the convictions demonstrate a tendency towards untruthfulness. The question is whether the evidence of previous convictions, or bad behaviour, is sufficiently persuasive to be worthy of consideration by a fair-minded tribunal upon the issue of the witness's creditworthiness. When the evidence is reasonably capable of giving assistance to the jury in the way we have described, it should not be assumed that the jury is not capable of forming an intelligent judgment whether it in fact bears on the present credibility of the witness and, therefore, upon the decision whether the witness is telling the truth. Jurors can, with suitable assistance from the judge, safely be left to make a proper evaluation of such evidence just as they are when considering issues of credibility and propensity arising from a defendant's bad character." 31. The court went on to set out what the approach of the trial judge should be under the equivalent to Article 82J(1)(b): "23. The first question for the trial judge under s.100(1)(b) is whether creditworthiness is a matter in issue which is of substantial importance in the context of the case as a whole. This is a significant hurdle. Just because a witness has convictions does not mean that the opposing party is entitled to attack the witness' credibility. If it is shown that creditworthiness is an issue of substantial importance, the second question is whether the bad character relied upon is of substantial probative value in relation to that issue. Whether convictions have persuasive value on the issue of creditworthiness will, it seems to us, depend principally on the nature, number and age, of the convictions. However, we do not consider that the conviction must, in order to

qualify for admission in evidence, demonstrate any tendency towards dishonesty or untruthfulness. The question is whether a fair-minded tribunal would regard them as affecting the worth of the witness' evidence." 32. Applying these principles to the facts of the case before it, the Court of Appeal considered the trial judge's exercise of judgment on the probative value of the complainant's convictions noting that it was particularly, but not exclusively, concerned with the conviction for manslaughter. The Court said "we take the view that each of these convictions is relevant in the wider sense as going to a fair-minded jury's proper assessment of the standing of the witness. We do not suggest that a comparatively old conviction for shoplifting or burglary would alone fall into this category in the context of the present case. However, the appellants are entitled to assert that cumulatively they convey a more complete picture of the status of the witness than otherwise would be available." Accordingly, the court concluded that the judge had erred in his decision to exclude the convictions from the jury's consideration. The Court observed at the end of paragraph 24 of its judgment: "Once it is decided that they are of substantial probative value in relation to an issue of substantial importance in the context of the case as a whole, there is no residual discretion except in the exercise of case management to refuse the admission of the evidence. Such discretion as there is will be exercised, for example, in the manner of presentation of the evidence to the jury, and the restriction of cross-examination to relevant matters."" 19. I was not concerned with evidence in relation to convictions but evidence of " bad behaviour ". The alleged conduct of the complainant on 14 th May 2021 plainly fell within that category. As to the Children's Service proceedings and the potential eviction proceedings by Andium, although this was asserted to be bad character evidence, it did not, in my view, meet the test as it was not evidence of " misconduct ". Misconduct is defined at Article 82A as " the commission of an offence or other reprehensible behaviour ". It seems to me that to be a participant as a parent in pre-proceedings and as a potential defendant in possession proceedings is not necessarily reprehensible behaviour. It may be, but on the facts of this case, I could not be satisfied that it was. Accordingly, the admission of such material I considered both on the basis that it might be bad character evidence but more generally if not bad character evidence should be considered by reference to the normal principles of relevance. 20. In support of their application, the defence referred to the defence case statement which alleged that the complainant was lying, and that the evidence that the complainant had on at least one previous occasion made a false allegation of assault, namely on 14 th May 2021. 21. Further, it was alleged the complainant was motivated to lie about the Defendant both out of revenge for the Defendant having ended their relationship and had formed a new one (which were matters that were already in evidence) and as a means of " providing a possible solution to her ongoing and longstanding difficulties with both Andium Homes and the Children's Service ". 22. It is said that the evidence as to the complainant's credibility was an important issue in the case and of substantial importance in the context of the case as a whole and without knowledge of certain facts particularised by the defence, it would be difficult, if not impossible, for the jury to appreciate the Defendant's assertion that the complainant had a motive to lie. The defence contended that the jury

needed to " understand the full background to the relationship between [the Defendant] and [the complainant] ". Nonetheless, the defence accepted that the Court needed to be satisfied that the particular evidence to be adduced was relevant to an important issue to be determined. 23. The defence produced a draft set of admissions drawn in part from a chronology of the Children's Service involvement with the complainant which they wished to adduce which demonstrated, they said, that the complainant had " a long history of presenting a concern to the Children's Service " and was on the cusp of eviction from her home rented from Andium. They said it was " important " that there was at least one example of the complainant having been deemed to have been untruthful to the police in respect of an allegation of a serious assault against the Defendant - the incident on 14 th May 2021. It was asserted that the complainant's history of engagement with the Children's Service was an instance where a " relatively long history of the same would be relevant ". The 36 draft admissions in relation to the complainant which the defence wished to adduce pursuant to Article 82J began with events in 2017 and included such matters as: "4. In December 2017, the Children's Service received intelligence that [the complainant] was involved in the taking and dealing of drugs whilst pregnant. 5. In January 2018 unborn [child's name] was placed on the child protection register under the category of neglect. 7. In February 2019 [the complainant] was refused Andium housing support but this was revisited later for the same month. 8. In January 2020 [child's name] case was closed at the Children's Service. He was deemed to be "thriving" in his parents' care but the case was reopened in July 2020 following further incidents of concern. 13. In December 2020 a neighbour of [the complainant] contacted the police to report concerns about a child at [the complainant's] property, constantly crying and being told to "shut up" by [the complainant]." 24. Various draft admissions referred to entries in logs provided by the Children's Service in respect of visits by social workers. Other draft admissions concentrated on the threat that the complainant might be evicted from her home. There was also reference to " pre-proceedings " meetings being held by the Children's Service including one on 2 nd August 2021 which the complainant had attended. Draft admission 33 referred to the complainant appearing in Court on 17 th August 2021 regarding an eviction notice. 25. I accept that the complainant's credibility was an issue in the proceedings, but in my view, the vast majority of the admissions that were contended for did not amount to important explanatory evidence and were not of substantial probative value in relation to a matter in issue in the proceedings, nor were they of substantial importance in the context of the case as a whole. 26. There was a real danger that to permit the extensive admissions contended for to be placed before the Court would result in the jury being side-tracked; focussing on collateral aspects of the complainant's history so as to distract the jury from the counts on the indictment. Although the jury was entitled to understand the fact that the relationship between the parties had been difficult as was the subject of agreed admissions in the terms set out above, the jury was not entitled to a detailed history of the complainant's relationship with neighbours, social workers and her landlord. 27. Certainly, bearing in mind the defence case, it was appropriate for brief admissions to be agreed so as to adequately evidence the defence case that the

complainant had motive to mislead the jury. Accordingly I granted the defence application in part to the extent that evidence may be admitted by way of admissions reflecting matters arising within the six months prior to the alleged assault and that counsel should agree wording to evidence the proceedings issued by the Children's Service and/or Andium, the complainant's landlord. In respect to the specific incident relied upon by the defence which took place on 14 th May 2021, in addition to the admission agreed by counsel, I gave leave for defence counsel to cross-examine the forensic medical examiner Dr Evans on the injuries sustained by the Defendant - on his account as a result of the assault upon him on 14 th May 2021 - as particularised at admission 45 which is set out in full above. Accordingly, the jury would fully appreciate the extent of the Defendant's injuries sustained on that occasion. 28. Counsel agreed admissions in the following terms, which were placed before the jury: "4. The property was a rental property, which was in the Complainant's name. The tenancy was with Andium Homes. 5. The Complainant was served with an eviction notice on 15th June 2021. The Complainant appeared in Court in relation to this eviction notice. There were multiple Court appearances but the eviction was not granted by the Court and the Complainant remains at the property. 6. The Complainant and the Defendant were being actively monitored in their care of their child by the Children's Service. Pre-proceedings were initiated in respect of their child, on 12th July 2021 and the Children's Service involvement remained after the end of the relationship between the Complainant and the Defendant and after the Defendant ceased living with the Complainant. Pre-proceedings is the last stage prior to issue of formal Care Proceedings in the Royal Court." 29. Further, the jury was provided with records of telephone messages exchanged between the complainant and the Defendant which indicated that the complainant was concerned to receive the eviction notice on th June 2021, the day of the first alleged assault. 30. At the outset of the hearing, I drew to the attention of counsel the decision made by Commissioner Clyde-Smith in the case of AG -v- E

[2021] JRC 252 where, in the context of an alleged assault committed by the defendant on the complainant in February 2021, the Crown produced a chronology setting out 12 incidents of physical and verbal abuse, including several incidents in 2013 and an incident in 2017. The Crown sought to adduce the evidence pursuant to Article 82E(1)(c) as essential background evidence, and pursuant to Article 82F as relevant to an important matter in dispute between the Crown and the defence, namely the issue raised in defence case statement as to whether or not the complainant sustained her injuries accidentally in the course of an attack that she instigated or whether as she suggested they were caused by the defendant. At paragraph 21 of the judgment the Court noted that in that case the Crown Advocate submitted that the jury were entitled to consider the complainant had made similar allegations against the defendant over the previous eight years which had a striking similarity to what she alleged happened on the evening in question namely: (i) becoming violent having consumed alcohol; (ii) placing his hands around the complainant's neck and strangling her; (iii) pushing or throwing her around; and (iv)

leaving the property immediately after the incident. 31. The defence opposed the admission of the evidence under both gateways upon which the Crown relied. 32. At paragraph 30 of his judgment, Commissioner Clyde-Smith said this: "Advocate Harrison submitted that in both R v P and R v Ladd the Court had identified a specific reason why the bad character would assist the jury, and he said there was no authority for the proposition that when a case concerns an allegation of domestic abuse, evidence of bad character in the form of past complaints is always admissible to assist the jury to properly understand the evidence in the case. I agree that there is no such authority with each case depending on its facts, but I venture to suggest that in cases of alleged domestic abuse, the background to the relationship and the history and pattern of behaviour will very often be relevant and probative; it is very difficult to consider conduct between two people in a relationship in isolation." 33. I generally agree with this observation but note that the extent to which the previous evidence ought to be admitted will vary depending upon the circumstances of each case. The Commissioner went on to conclude that the evidence before him was important explanatory evidence under Article 82E(1)(c) and was also admissible under Article 82F, i.e., in respect of whether or not the complainant suffered injuries accidentally in the course of an attack which she instigated or at the hands of the defendant. 34. In his "postscript", the Commissioner went on to set out the direction he gave to the jury, as agreed by counsel, in relation to the relevance of the past incidents highlighting that they were relevant to the two issues for which they had been admitted. Direction to Jury 35. Once bad character evidence has been admitted, the use to which it may be put at trial is not restricted by reference to the gateway pursuant to which it was adduced. As Lord Woolf noted in Highton

[2005] EWCA Crim 1985 : "A distinction must be drawn between the admissibility of evidence of bad character, which depends upon it getting through one of the gateways, and the use to which it may be put once it is admitted. The use to which it may be put depends upon the matters to which it is relevant rather than upon the gateway through which it was admitted. It is true that the reasoning that leads to the admission of evidence under gateway (d) may also determine the matters to which the evidence is relevant or primarily relevant once admitted. That is not true, however, of all the gateways. In the case of gateway (g), for example, admissibility depends on the defendant having made an attack on another person's character, but once the evidence is admitted, it may, depending on the particular facts, be relevant not only to credibility but also to propensity to commit offences of the kind with which the defendant is charged." 36. Accordingly, it is always important to consider the directions to give the jury. In this case, the jury were directed as follows with the agreement of Counsel: "Previous incidents involving [the complainant] and the Defendant These are referred to at paragraphs 41 to 45 of the admissions. You have heard about these matters as they are background to the relationship between [the complainant] and the Defendant. You can take them into account when considering the credibility of [the complainant] and the Defendant respectively; in other words, when deciding whether or not you can rely on the evidence that they gave. It is for you to decide

what weight to give these matters and the extent to which, if any, they assist you in deciding whether you can rely on the evidence of [the complainant] and the Defendant." Authorities Police Procedures and Criminal Evidence (Jersey) Law 2003. AG-v-PMB

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