

JERSEY / JUDGMENT

AG v Canavan [2024] JRC 042 (22 February 2024)

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JUDGMENT

THE COMMISSIONER: 1. The Defendant is charged under an indictment containing two counts both relating to incidents on 3 September 2023 at Wellington Park Estate. The first count alleges that he committed a grave and criminal assault on one Matthew Harris. The second count alleges that he was in possession of an offensive weapon on the same occasion contrary to Article 41(1) of the Firearms (Jersey) Law 2000, the particulars of offence being that he had in his possession without lawful authority or reasonable excuse offensive weapons, namely two knives. An application to amend the charge to refer to Article 43(1) is expected to be made. The Defendant appeared before the Magistrate on 6 September 2023 and entered not guilty pleas. Jurisdiction was declined and the case was sent to the Royal Court for indictment on 10 November with the Defendant remanded in custody. On 29 September, the case was listed for mention in the Royal Court and the Defendant indicated that he wished to enter guilty pleas to both charges. However at that stage no basis of plea had been provided. This was provided on 20 December 2023. Although the Crown's case summary had indicated the Crown case to be that the Defendant had attended at the Complainant's property armed with two knives, it was unclear until the basis of plea was signed that the Defendant maintained a different account. In summary he asserted that he was set upon by three people, one of which was Mr Harris; they were verbally aggressive to him and there was an argument over money which had been loaned by him to Mr Harris but which had not been repaid. The Defendant asserted that at least one of the gang had brandished a knife. He was set upon by the group and suffered injuries as a result of being kicked, punched and stabbed, but he ran away. Some time later that evening he took a taxi from his girlfriend's house, and as the car drove past the house occupied by the Complainant, the Defendant got out of the taxi and began to shout for him to come out of his house. He said that he wanted to confront him one to one about the money owed and about the earlier incident when he had been set upon. The allegation made by the defence is that the Complainant came out of his house and acted aggressively towards the Defendant, brandishing a knife and waving it back and forth. As he did so he dropped it and the Defendant reached down to pick up the knife when he felt a blow to the side of his head and severe pain. He did not understand at the time that he had been attacked by the Complainant with what he described as a machete but was probably a large knife. As he regained balance and control the Defendant stabbed the Complainant twice. 2. That account by

the Defendant is sufficiently different to the Crown case that the issue was adjourned for trial at a Newton hearing which is scheduled to take place on 26 and 27 February. The main issue before the Court at that time will be whether or not the Defendant returned to the Complainant's property armed with one or two knives: if he did, the assault on the Complainant, which the Defendant has admitted, takes on a different character because there would be some premeditation to it. 3. That is the background to the applications which have come before me for pre-trial directions. Bad character 4. The Crown has made an application to admit convictions of the Defendant pursuant to Article 82E and 82F pursuant to the Police Procedures and Criminal Evidence (Jersey) Law 2003 . The defence has accepted that the offences in question should be admitted and accordingly no objection is taken to those convictions going in. Having considered the convictions which the Crown wish to adduce, I have agreed that all save two convictions for assaulting a police officer in the execution of his duty may go before the Jurats on the Newton hearing. I do not consider that the charge of assaulting the police officer is sufficiently close to what is alleged against the Defendant in the present proceedings. His convictions for battery (two), assault occasioning actual bodily harm and possessing offensive weapons (two) and possessing a prohibited weapon will all go in evidence before the Newton Court. Special measures 5. Two witnesses are available to give evidence on behalf of the Crown, being witnesses to the assault in question. The Crown applies for special measures in connection with them - first that screens should be erected so they cannot see the Defendant, and they cannot be seen by the members of the public who might be attending trial. The other special measure sought is an order permitting their ABE interviews to be given as their evidence in chief. 6. The essence of the application is that they are frightened to give evidence having regard to the seriousness of the incident which they witnessed, the concern being that the Defendant might have violent friends or associates who could seek retribution from the witnesses for giving important evidence. It is said that neither the Defendant nor his associates currently know the witnesses, nor what they look like. If on the other hand the Defendant becomes aware of what they look like, or precisely where they live, it would make reprisals more likely. Advocate Hall put it to me that these witnesses live where they do with their children; they have been adversely affected by witnessing the stabbing; and, reasonably or otherwise, their evidence will be affected if screens are not erected. It is also said there would be no adverse impact on the Defendant. The request by the Crown to rely on the ABE interview as evidence in chief is put slightly differently. There is a limited window for the Newton hearing, and it is thought that if the Jurats see and listen to the ABE interview in advance of the trial, that will save a considerable amount of time. It is also said that the Defendant would still be able to cross-examine the witnesses, and therefore no prejudice would be sustained by him. 7. The legal basis for the order for special measures, leaving aside the inherent jurisdiction of the court to take procedural steps to ensure justice is done, is to be found in Articles 100 to 101 of the Criminal Procedure (Jersey) Law (the "2018 Law"). For the purposes of the present application, the critical question is whether I am satisfied (Article 100(2)(b)(ii)E) that the " quality of evidence given by the witness is likely to be diminished by reason of fear or distress on the part of the witness in connection with testifying in the proceedings". 8. Advocate Blakeley objects to the erection of screens. In his submission, the test cannot be whether a witness says he is frightened; and accordingly it is a matter for the Court to apply both an

objective and subjective test in deciding whether the witness is in fact fearful and if so why. If no good reason for being fearful exists, that makes it less likely that the fear exists at all and no special measures should be ordered. 9. However, as I have indicated, the test under Article 101 of the 2018 Law is whether or not the Court is satisfied the quality of evidence will be diminished by reason of fear or distress. That is an assessment which the Court has to make in all the circumstances of the case including the views expressed by the witness. As far as those views are concerned, I accept that the more unreasonable the views might be, the more difficult it will be for a Court to accept that the witness is truly in fear or distress, and that the quality of evidence will be diminished as a result. 10. At the extreme end of the spectrum, it might be that a Court could theoretically conclude that the alleged fear or distress is so unreasonable that no person could reasonably be understood to be suffering from it, including the witness, and of course in those circumstances the Court would not be satisfied that the quality of evidence given would be diminished by reason of fear or distress. At the other end of the spectrum is a case where it is wholly understandable that the quality of evidence would be affected by fear of the defendant - particularly so when the witnesses have suffered some gruelling assault at his hands in the first place and are giving evidence about it. 11. The present case falls at neither end of the spectrum. The witnesses in question are only going to be giving evidence as to what they saw, and they did not suffer any assault personally. It is rare for witnesses to be the subject of reprisals at the instance of a defendant after the trial has taken place because the defendant has nothing to gain and everything to lose by taking any steps of that nature. But that does not mean that it is wholly irrational for a witness to be distracted when giving evidence nor is it necessarily a reaction which is incapable of being understood. The test for the Court is whether the quality of evidence, on the balance of probabilities, is likely to be diminished by reason of fear or distress. 12. In the present case, the evidence which the witnesses will give is not directly on point in the sense that neither of them is able to say that the Defendant came to the Complainant's property armed with a knife. Each of them can only describe the assault as they saw it and what they heard both then and in relation to the earlier incident. Nonetheless, a stabbing in a public place is a serious matter - indeed, that is why, in theory, an assault of such a nature is capable of being charged as an affray which is also a serious offence. Irrational fear is still fear. It may affect the quality of the evidence which a witness may give. Whilst in this case I do not consider the fear necessarily to be entirely rational, I well understand why it might exist, and in those circumstances I am satisfied on the balance of probability that the quality of evidence might well be diminished if I do not make an order for special measures. In the circumstances I have agreed to the Crown's application that, when giving evidence, each of the two witnesses in question should be screened from the Defendant. 13. I see no reason why there should be screening from the public gallery. However, in the unlikely event that the Newton hearing is attended by associates of the Defendant, I would be alert to any application renewed by the Crown that the witnesses should be screened from the gallery as well. The ABE interview 14. I see no reason for permitting the ABE interview to be adduced in this case. The main reason for this is that if I were to acquiesce in the application, I would find it hard not to acquiesce in the same application being made in every criminal case. It would always be more convenient in the sense of saving time if the witness could have his or her ABE interview stand as the evidence in chief, particularly so if the interview

were to be edited to remove those parts of the evidence which had no relevance. For my part, I do not think that the absence of any prejudice to the Defendant, if that be true, in adducing the evidence in chief in this way is a material factor. The right approach is to ask whether there is any particular reason why the ABE interview should stand as the evidence in chief, and not to ask whether there is any reason why it should not. The standard procedure in criminal trials is that where evidence is disputed, the witness is required to attend Court and inform the Court in oral evidence what that person's testimony is. The evidence is then tested in cross-examination. While it is true that giving evidence is not a memory test, counsel should be able to adduce the material evidence by questions to the witness which the witness can answer to the best of his or her ability. In contentious matters, the rules around avoiding leading questions are there for ensuring that there is a spontaneity to the evidence of the witness, which is important, and which may be missing on an ABE interview. I would be very loathe to see the general rule that witnesses give evidence in person (even if sometimes remotely) undermined by the routine adducing of their evidence by an ABE interview. 15. Here the witnesses in question are not victims; they do not even necessarily have very much direct evidence to give on the point; and there is every reason to anticipate that their evidence will be much more direct and to the extent that it is relevant, much more focussed on the relevant material if they attend Court and give evidence orally in chief in the usual way. Expert evidence 16. The Crown have instructed Cellmark to provide some evidence as to the DNA found on a number of knives submitted to Cellmark for analysis. In short summary, the DNA analysis seems to indicate that some knives have DNA associated with the Defendant and some with DNA associated with the Complainant. The DNA of third parties is not excluded in some cases. What I have had put before me are the results of the examination of these knives, but I have not had the conclusions. The documents put before me make it plain that they are not Cellmark's report. 17. The adducing of expert evidence needs consent from the Court in a criminal trial. This is reflected, inter alia, by Rule 45 of the Criminal Procedure (Jersey) Rules 2021. By Rule 48, a party wishing to introduce expert evidence must serve the expert's report as soon as practicable. In this case objection is taken that the Cellmark documents are not in fact the report at all, as is clear from what they say, and that therefore there has been a non-compliance with the relevant Rules. Furthermore it is said that if the evidence is adduced the defence may wish to refer the findings to a defence expert who can put his own conclusions on the same forensic evidence. Yet, such is the timetable now that this will not be possible before 26 February - indeed the prosecution report itself has not yet been received and part of the results were only received yesterday. 18. One might think in the circumstances that an adjournment was the answer. Advocate Blakeley argued strenuously that an adjournment would not be fair to the Defendant. He is on remand in prison, and has been waiting for the Newton hearing for some time. Indeed no one is applying for an adjournment. 19. In the light of the fact that no adjournment is sought by either side, and recognising that if there were to be an adjournment it might be some two to three months before the Newton hearing took place during which time the Defendant would remain on remand, I consider that the expert report should not be placed in evidence. I am fortified in that conclusion by the fact that what we have at the present time is far from conclusive. Parts of the report would seem to favour the Defendant, notwithstanding that it is the Defendant who objects to it going in. However, the material put

before me at the moment is somewhat equivocal as Advocate Hall very fairly conceded. In those circumstances, it does not seem to be right to adjourn the Newton hearing on the off chance that the opinions expressed in the final report are likely to have more substance or to be more directed as the case may be than what can be gleaned from the existing material. 20. I emphasise that although there was a breach of the Rules, at least theoretically, in not providing any expert report at an early stage, I accept the general thrust of Advocate Hall's submissions that, as she put it, the police "downed tools" following the original guilty plea because it was not apparent until 20 December that the guilty plea involved assertions which were inconsistent with the prosecution case. The prosecution is not therefore at fault for the delay in question: rather I have taken the practical view where there is doubt as to the relevance of what would be put in the expert report and it is information which will not become available to the Defendant for some days yet, that it would be improper to allow in this part of the evidence, given the delay and/or prejudice to the Defendant that may cause. Hearsay evidence 21. The last application by the Crown was for the admitting of some hearsay evidence pursuant to Article 64 of the Police Procedures and Criminal Evidence (Jersey) Law 2003 (the "2003 Law"). 22. The evidence in question relates to footage from the body worn cameras of two police officers. In order to place that evidence in context, I need to recite some further facts as contained in the Crown's summary. 23. On the day on which the incident took place, the Defendant was involved in an altercation outside a property in Wellington Park Estate. This is the argument referred to earlier over the reclaiming of the alleged debt. The Defendant left the area, but at approximately 9.30pm had apparently returned because one of the neighbours heard him shouting words to the effect that the Complainant was now on his own and he should come out; and that the Complainant told the Defendant just to go and sober up. 24. At approximately 10.15pm the Defendant emerged from a taxi in the same part of Wellington Park Estate. This was when the incident took place and at 10.33pm, the Defendant made a call to the force control room to request an ambulance saying that he had been stabbed in the face and was in Wellington Park Estate. When the police arrived they found the Defendant there with a large laceration to the left side of his face which was bleeding heavily. He informed the police officers that it was the Complainant who had injured him. At approximately 11.24pm, five officers attended at the Complainant's address and arrested him on suspicion of a grave and criminal assault. On searching the Complainant, a puncture wound was noted near his right armpit. Paramedics attended to him and he was taken to hospital where various items of clothing were seized. At approximately 3.50pm the following day, PC Labey took over hospital guard duties, and some time around 8.14pm that day (nearly twenty-four hours after the incident) the Complainant had a conversation with PC Labey which is captured on the body worn camera. 25. The Crown wish to adduce evidence from Acting Police Sergeant Howgate who had arrested the Complainant at approximately 11.24pm on 3 September and from PC Labey who had the conversation with the Complainant at approximately 8.14pm the following day. The body worn video footage contains statements made by the Complainant otherwise than in the presence of the Defendant, and therefore amount to hearsay. 26. The Crown are not intending to call the Complainant. I was informed by Advocate Hall that the reason that the Crown would not be calling the Complainant was that he was currently under investigation himself for an offence of grave and criminal assault on the same occasion, and it followed that

the Law Officers' Department could not present the Complainant as a witness of truth. Thus it is clear that the Crown wish to adduce the evidence of what the Complainant said to the police officers as substantive proof of the truth of what he said, without the Defendant having the ability to cross-examine the Complainant on that evidence. 27. Advocate Blakeley opposed the introduction of that evidence, in particular founding his position on Article 76 of the 2003 Law which provides the Court with a discretion to exclude otherwise admissible evidence if it appears to the Court that, having regard to all the circumstances including the circumstances in which the evidence was obtained, the admission of the evidence would so adversely affect the fairness of the proceedings that the Court ought not to admit it. 28. As an alternative Advocate Blakeley submitted that the body worn footage was not in each case part of the *res gestae* and that it did not fall within Article 64 when one considered the factors which that Article required the Court to take into account in determining admissibility. 29. The central plank of the argument under Article 76 was that it would be grossly unfair to the Defendant to take some only of the evidence which might be given by the Complainant and put it before the Court as hearsay evidence in circumstances where the Complainant could not be challenged. The essence of the argument was as to who started the fight - did the Defendant return to the scene in the late evening armed with a knife, in which case it could well be said that he went with some premeditation and carried a larger responsibility for the fight which had ensued, or was the assault committed during the course of a fight which had been started by the Complainant? 30. In my judgment, the inability to cross-examine the Complainant is a very material factor to the exercise of my discretion under Article 76. The present circumstances are just the sort of circumstances where it would be desirable for the two participants in the fight to be indicted together; but even if that were not possible, the inability to cross-examine does in my judgment very adversely affect the fairness of the proceedings because the Court will hear only second hand and untested evidence from one of the two protagonist, which is critical to a resolution of the issues it has before it. 31. Furthermore, although I regard the inability to cross-examine as quite fundamental in all the circumstances of this case, the Crown's application did not in my judgment really get off the ground at all. When I asked the Crown Advocate why the Complainant was not giving evidence, the answer was that he was currently under investigation, and he was not being called "as a witness of truth". If ever cross-examination was important, it would be in circumstances where there was doubt as to whether the witness was telling the truth or not. Here I was faced with an application to put hearsay evidence in as to what a witness has said in circumstances where the Crown itself was unsure whether he was telling the truth, and no testing of that evidence would be possible. 32. The position is aggravated by the fact that in the first body worn camera images, the Complainant is clearly suffering significantly from the stab wound or wounds, almost losing consciousness at times, and had been cautioned. On the second occasion, which seems to me to be not part of the *res gestae* any longer, occurring as it did nearly twenty-four hours after the incident, the caution is repeated at the outset, and it is far from clear whether the complainant might be considered as taking the opportunity of feathering his own nest in concocting the story to the police officer. I reached without hesitation the conclusion that I would have to qualify the directions to the Jurats so severely when considering this evidence that the evidence would be worthless in practical terms, and it would not be safe to rely upon it. 33. That being so, in the

balance under Article 76 as to the prejudice to the Defendant and the fairness of the trial, there was in my judgment no doubt that I should exclude the evidence of the body worn footage of the two officers. Authorities Firearms (Jersey) Law 2000. Police Procedures and Criminal Evidence (Jersey) Law 2003. Criminal Procedure (Jersey) Law 2018. Criminal Procedure (Jersey) Rules Page Last Updated: 22 Apr 2024 Back to top About JLJB Accessibility Contacts Copyright Disclaimer Feedback Privacy policy Site map This website is not compatible with your web browser. You should install a newer browser . If you live in Jersey and need help upgrading call the States of Jersey web team on 440099. BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII

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