

JERSEY / JUDGMENT

AG -v- Cullen [2016] JRC 224 (06 December 2016)

[2016] JRC 224

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JUDGMENT

THE commissioner: 1. The defendant faces an indictment containing four counts of indecent assault. Counts 1 and 2 involve one complainant ("Complainant 1") and Counts 3 and 4 involve a second complainant ("Complainant 2"). The defendant has brought an application contending that Counts 1 and 2 are not properly joined in the same indictment as Counts 3 and 4. If he fails on that application, he submits as an alternative that Counts 3 and 4 should be severed and tried separately from Counts 1 and 2. 2. I heard the application on 17th November, 2016, at which time I reserved my decision. I announced my decision to reject the defendant's application on 21st November, 2016. This judgment contains my reasons for reaching that decision.

Background

3. It is necessary first to outline the case against the defendant. I take this substantially from the Crown's case summary and the witness statements of the two complainants. 4. Counts 1 and 2 allege indecent assault on Complainant 1 on 18th and 19th January, 2010. Complainant 1 is a male who was aged 20 at that time. He met the defendant when he started work at a building site on 18th March, 2010. The defendant also worked on that site. Complainant 1 did not know the defendant but the defendant told Complainant 1 that he knew certain details about Complainant 1's personal life such as where he lived and where he drank. Not long afterwards, the defendant told Complainant 1 that he knew Complainant 1 had been in an intimate relationship with a girl he named and then said " apparently you're hung like a horse ". Complainant 1 thought that this was just banter and laughed it off. However during the course of the day the defendant made further comments to Complainant 1 which he took to be about the size of his penis e.g. " you should be proud of that. Look at the size of that lump ". 5. Later that day the defendant asked Complainant 1 for a drink after work and they consumed some 3 - 4 pints in a pub. On leaving the public house, the defendant suggested they walked together as they lived in the same direction. Complainant 1 mentioned that he liked Irish coffee. The defendant informed Complainant 1 that he was famous for his Irish coffee and invited him back to his flat to show him how to make one. 6. Once inside the flat the defendant put on some Irish music. At one stage he nudged Complainant 1, staring at his groin and said " I'm intrigued by the size of it " and he

then moved his hand towards Complainant 1's groin, who quickly pushed it away and made it clear that he was not interested. 7. The defendant went to the kitchen to make the Irish coffees and Complainant 1 saw him putting a substantial amount of whisky into the coffees. 8. Complainant 1 went to the bathroom and while he was urinating, the defendant opened the door and tried to look over Complainant 1's shoulder to see his penis. He was saying things like "let me see it because you need to prove it". Complainant 1 returned to the lounge and sat down. He was afraid to say anything because the defendant had told him earlier that he had been a boxer. 9. The defendant then got a tape measure out, extended it and said words to the effect "what's the size of yours? That's the size of mine". He then started to prod Complainant 1's leg and penis with the tape saying "I can see the size of it floppy through your shorts". This forms the basis of Count 1. 10. The defendant then stood up, undid his jeans and got his penis out which he started flicking. When Complainant 1 asked him what he was doing, he replied that he was getting it a bit hard so that they could measure their penises. Complainant 1 made it clear he was not interested and the defendant put his penis away. Whilst doing so, he asked Complainant 1 if he trimmed his pubic hair. The defendant then sat down next to Complainant 1, nudged him and said "this is a safe house, it's between us, mine and your business...". Complainant 1 stood up to go but the defendant asked him to wait whilst he played a song on his guitar, following which Complainant 1 left. 11. The next day, 19th March, the defendant approached Complainant 1 at work and engaged in a conversation about a mutual acquaintance. At one stage in the afternoon they were alone. When Complainant 1 adjusted his shorts, the defendant told him to "stop playing with that thing, its embarrassing me". The defendant then used the back of his hand to tap Complainant 1's penis twice before he cupped his hand around Complainant 1's penis and testicles. Not long afterwards Complainant 1 referred to the Irish coffee the night before to which the defendant replied "shhhh, don't tell anyone, it's our little secret". 12. Following further contact with the defendant on 20th and 23rd March, Complainant 1 reported the incident to the police on 24th March. 13. The defendant was arrested on 4th May and subsequently interviewed. He said that he had no sexual desires towards males. He confirmed that he had made the majority of the reported comments to Complainant 1 on the building site but explained them all away as work banter or having a "craic" with the new boy. He denied touching or attempting to touch Complainant 1's penis but then stated that he may have touched Complainant 1's penis through his clothing with the back of his hand. However, if he did there had been no sexual intent. This was with reference to the alleged assault in the workplace (Count 2). In relation to the incident in the flat, the defendant admitted making some of the comments reported by Complainant 1 and confirmed that he had taken a tape measure out and spoken about the size of men's penises but explained that this was all a joke. He could not recall if he poked Complainant 1 with the tape measure. 14. Counts 3 and 4 concern Complainant 2 who was aged 22 when the alleged assaults occurred in June 2015. The prosecution case is that after an evening drinking with friends, the complainant was walking through the Royal Square when he met the defendant. He knew the defendant because the defendant was a customer at a bar where Complainant 2 worked as a barman. He had however never socialised with him. 15. They struck up a conversation

and the men discussed the death of a mutual friend. The defendant invited Complainant 2 back to his place for a drink. Complainant 2 thinks the defendant mentioned coffee. 16. On arrival at the defendant's flat, Complainant 2 sat down on a two-seater sofa. The defendant sat down next to him. As the sofa was small, the defendant was in bodily contact with Complainant 2 who tried to shuffle away. The defendant started to tell Complainant 2 about his sexual experiences in the flat including telling them about a girl that Complainant 2 had been seeing a few months earlier. 17. The defendant told Complainant 2 that he had a "little black book" in which he recorded the size of other men's penises. He asked Complainant 2 to get out his penis and let the defendant see it. Complainant 2 refused. 18. About 30 minutes later, the defendant undid his belt, pulled down his jeans and boxer shorts exposing his penis and started to play with himself. Complainant 2 again said it was not his thing. The defendant then said he was going to put on some pornography to make Complainant 2 feel more comfortable. The defendant stood up and put on a heterosexual porn film. He then sat down next to Complainant 2 and started to masturbate. He mentioned how big the penis of the male in the porn film was. The defendant asked Complainant 2 more than once to get out his penis. In an attempt to shut him up, Complainant 2 pulled his jeans and boxers down and showed the defendant his penis. 19. The defendant grabbed hold of Complainant 2's penis with his right hand and said "let's have a better look". This gives rise to Count 3. 20. Complainant 2 remembers the defendant getting out his guitar and singing. The defendant suggested going to the bedroom. When Complainant 2 stood up he felt disoriented and the room began to spin. The men made their way to the bedroom. After the men got into bed, the defendant grabbed Complainant 2 from the side and put his hand on his hip. Complainant 2 pushed the defendant away and told him to stop but the defendant continued to grab his leg, hips and thighs. 21. Complainant 2 woke up with his back to the wall facing the defendant who was holding on to his legs. He felt his penis inside the defendant's mouth. He tried to punch down to stop the defendant. He appears to have passed out. 22. When he woke in the morning, he got out of bed and dressed. The defendant suggested going for breakfast. Complainant 2 states that he was dazed and terrified and did not know what to do, so he agreed to go for breakfast. As they were about to part company after that, the defendant said to Complainant 2 "Mum's the word". 23. Complainant 2 reported the matter to the police later the same day. The defendant was arrested. At interview he said, amongst other things, that at the flat, they had begun discussing penis sizes. The defendant said he had what he called a "black mamba". He had taken his penis out from his pants and showed it to Complainant 2. Complainant 2 responded by taking his penis out to prove it was big and the defendant remembered commenting that it was a big black mamba. The defendant admitted that he took hold of Complainant 2's penis for about 3 seconds and gave it a little shake but said that Complainant 2 did not object. He said that it was Complainant 2 who instigated going to bed and there was mutual rubbing and touching around the groin area over underpants. He said that Complainant 2 had fully consented to what was taking place. He denied that he had given Complainant 2 oral sex. Are all the accounts properly joined in the same indictment 24. 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." 25. 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." 26. It is clear that, when considering whether there is a nexus, it is relevant to consider the cross-admissibility of evidence in relation to the different charges, i.e. whether there is similar fact evidence. Thus in *H v AG*

[2013] (1) JLR 210, Calvert-Smith JA said at para 29:- "If the Commissioner was right to find that the evidence of one complainant was capable of supporting the evidence of the others and vice-versa, then the counts were clearly both properly joined and properly tried together." 27. See also the observation of Clyde-Smith Commissioner in *AG v P* at para 10 where he said:- "Thus a nexus is clearly established if there is cross-admissibility of evidence although the rule is not confined to such cases. It is helpful therefore as a starting point to have regard to the extent that there is cross-admissibility of evidence in this case." 28. I respectfully agree and accordingly propose first to consider the question of cross-admissibility, i.e. does the evidence of Complainant 1 support the evidence of Complainant 2 in respect of Counts 3 and 4 and vice-versa? 29. The test for similar fact evidence in this jurisdiction was conveniently summarised in *U v AG*

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

[1991] 2 AC 447. In the case of *U* , Nutting JA said this at para 13:- "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 "an ultra-cautious jury"..... 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.... This qualification is illustrative of the more general principle mentioned above, which requires the court to balance the probative value of any admissible similar fact evidence against its prejudicial effect, and to exercise a discretion in deciding whether to allow it to be adduced - a discretion which is exercised by reference to the interests of justice....". 30. Advocate Bell submitted that there was insufficient similarity for there to be cross-admissibility in relation to the evidence of Complainant 1 and Complainant 2. He highlighted the following differences:- (i) The acts alleged were different. Complainant 1 alleges touching of the penis over clothing whereas Complainant 2 alleges touching of the naked penis and oral sex. (ii) The relationship between the defendant and the two complainants was different. Complainant 1 was a work colleague who the defendant got to know on a building site whereas Complainant 2 was a barman whom the defendant had got to know in a bar. (iii) Complaint 1 is alleged to have been assaulted once at the defendant's flat and once at the workplace whereas Counts 3 and 4 in relation to Complainant 2 both relate to the flat. Furthermore there is a five year gap between the alleged offences. (iv) Complainant 1 is clear that he was not a willing participant in the conduct complained of whereas Complainant 2 admits that he voluntarily got his penis out in the defendant's flat. (v) Complainant 2 recounts the use of pornography to encourage him whereas there was no pornography in relation to Complainant 1. (vi) Complainant 2 voluntarily stayed the night and indeed went out for breakfast with the defendant whereas nothing of this nature occurred in relation to Complainant 1. 31. In short, Advocate Bell submits that the only relevant similarities which the Court can point to are the fact that both complainants are male and that the defendant is alleged to have indecently assaulted both by touching or trying to touch their penises. This was insufficient to meet the test for admitting similar evidence. 32. As well as the leading cases of *U* , and *DPP v P* referred to earlier, *I* was also referred to *X v AG*

[1998] JLR 221 , *AG v P*

[2013] (1) JLR 45, *H v AG*

[2013] (1) JLR 210 and *F v AG*

[2016] JCA 168 . However, as Perry JA made clear in *F* at para 47, each case turns on its own facts and the issue is really one of degree. 33. In my judgment, despite the differences highlighted by Advocate Bell, there are very considerable similarities in the evidence of the two complainants such that, to use Nutting JA's wording in *U* , an attempt to explain the similarities away by coincidence would be in an affront to common sense or against all probabilities. The relevant similarities are as follows:- (i) The complainants were both young men of similar age (20 and 22). (ii) The defendant invited both men back to his flat after they had been drinking. (iii) When he invited them back, the subject of coffee was mentioned. (iv) The defendant plied both complainants with alcohol at his flat. (v) The

defendant spoke to both Complainants about women with whom they had been in relationships. That conversation indicated that the defendant knew that both men were heterosexual. (vi) The defendant exposed his penis to both men. (vii) He made clear to each complainant that he was obsessive about the size of men's penises and kept asking each complainant to show his penis to him. In the case of Complainant 1, there had been an initial comment about the size of Complainant 1's penis at work and at the flat this sort of comment continued. The defendant tried to see Complainant 1's penis whilst he was urinating. He then asked if he could see it to see how big it was and pulled out a tape measure saying that he wanted to measure Complainant 1's penis. As to Complainant 2, he referred to the little black book in which he recorded the size of other men's penises. When watching the pornographic movie with Complainant 2, the defendant mentioned the size of the penis of the male in the film and asked the Complainant to show him the size of his penis. (viii) After touching each complainant's penis in his flat the defendant played his guitar and sang to each complainant. (ix) The defendant told both complainants in similar terms that they should keep quiet about what had happened. He told Complainant 1 "shhh, don't tell anyone its our little secret" and he told Complainant 2 "Mum's the word". 34. There is no evidence that the complainants are known to each other or have had any opportunity to put their heads together prior to making their statements. Whilst of course there are differences in what occurred as listed by Advocate Bell, I consider that the similarities in the evidence of each - some of them quite unusual - are such that, to quote Perry JA in F at para 42:- "... there is material upon which a jury would be entitled to conclude that the evidence of one complainant about what occurred is so related to the evidence given by another complainant, about what happened to that other complainant, that the evidence of the first complainant provides strong enough support for the evidence of the second complainant to make it just to admit it, notwithstanding its potential prejudicial effect. In my judgment, its probative value outweighs the prejudicial effect." Whilst each case is different, I consider that the similarities in this case are greater than they were in F where the Court of Appeal held that there was cross-admissibility. 35. Having concluded that the evidence is cross-admissible, it follows that there is sufficient nexus between the counts and that they are therefore properly joined on the same indictment. 36. I should add that, even if I were held to be wrong about cross-admissibility, the features of similarity which I have articulated above are sufficient to provide a nexus such that they can properly be described as a series of offences of a similar character. There is therefore no misjoinder. Severance 37. Having found that there is cross-admissibility of evidence, the normal consequence is that it is appropriate for all the counts to be tried together. I see no reason to take the unusual course of ordering severance where the evidence is cross-admissible and I therefore decline to sever Counts 3 and 4 from Counts 1 and 2. 38. However, in case I am held to be wrong about cross-admissibility, I shall consider whether it would be appropriate to order severance even if there is no cross-admissibility of evidence. 39. On this aspect, Advocate Bell referred me to the decision of Commissioner Clyde-Smith in AG v P and, in particular, to his approval of paragraph 18 of the comment of Lord Cross of Chelsea in DPP v Boardman

- [1975] AC 421 at 459 where Lord Cross referred to the jury having to perform mental gymnastics by putting out of their mind when considering one count that other complainants are making similar allegations against the defendant. 40. He also referred me to a commentary in Criminal Law Week 2006/35 which commented critically upon a decision of the Court of Appeal to uphold a decision of the trial judge not to order severance even where the evidence was not cross-admissible. The commentary described it as the "standard judicial fudge". 41. I consider that the approach has changed somewhat since the decision in Boardman in 1975. The leading authority is now *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." 42. 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." 43. 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. 44. In this jurisdiction, the Court of Appeal has considered the same topic in *H v AG* 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." 45. Applying these principles to the facts of this case, I would not order severance even in the absence of cross-admissibility. 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 both 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 two trials and the matter will hang over him for a considerable period. Most relevantly, assuming no cross-admissibility, the jury will be directed to consider Counts 3 and 4 quite separately from Counts 1 and 2. As indicated by both Lord Taylor and Lord Hope in *Christou*, I am confident that the jury would loyally follow such direction and consider the counts separately. In all the circumstances, I consider that it would be in the interests of justice for these matters to be tried together even if there were no cross-admissibility. Screen 46. The prosecution have applied for leave for Complainant 2

to give his evidence from behind a screen. I have been provided with a statement which the complainant has made in which he states that having the defendant look at him as he gave evidence would reduce his ability or capacity to give his evidence. He says that he has not seen the defendant for over a year and the last time he saw him on the street he just froze. He felt that there was nothing he could do. He felt as if he was re-living what had happened and this affected him greatly. He has been receiving counselling as a result of what occurred and has been signed off work for a period of six months. He has also been prescribed medication to help him deal with the anxiety and stress which he attributes to the alleged assault. He feels he would not be able to give his evidence to the best of his ability or capacity if he is not given this assistance by way of special measure. 47. I was referred to the decision of the Court of Appeal in *Myles v AG*

[2005] JLR N19, [2005] JCA 065 where at paragraph 19 the Court of Appeal held that, when faced with an application for a screen, a judge must first be satisfied that the quality of the witness's evidence may be adversely affected by fear or distress or for some other reason. If the judge is satisfied of this, then he needs to balance the adverse effect on the witness if there is no screening against the potential prejudice to the defendant if there is screening. 48. Advocate Bell submitted that there was insufficient evidence that the witness's evidence might be affected if there were no screen. There was no evidence from an expert or anyone similar; there was simply a statement from the witness in circumstances where it had clearly been suggested to him by the police that he could apply for such a measure. Conversely, submitted Advocate Bell, there would be prejudice even if an appropriate direction were given. It would suggest to the jury that there was some reason why the witness needed to be protected. Given the conduct of Complainant 2 on the night in question, it seemed unlikely that he would truly be distressed by the thought of having to give evidence in the presence of the defendant. 49. In my judgment, even since the decision in *Myles*, the approach to the use of screens has developed. There is a clear understanding that it is an important aspect of the criminal justice system that witnesses should be given assistance where appropriate so that they can give of their best in the witness box. It is now commonplace for screens to be used in sexual cases. I consider that the risk of prejudice to the defendant is minimal. Juries are told by the judge that this is common practice and should not be held against the defendant. I see no risk therefore of the jury concluding that there is something about this particular defendant which requires the witness to be protected from him, as Advocate Bell suggests. 50. In the light of the statement from Complainant 2, I am satisfied that his evidence may be affected by distress. Conversely I see no risk of prejudice to the defendant provided that an appropriate direction is given to the jury. 51. In the circumstances, I grant the application of the prosecution that Complainant 2 may give his evidence from behind a screen. Authorities Indictments (Jersey) Rules 1972. *AG v P*

[2013] 1 JLR 45 . Archbold (2016 edition). *H v AG*

[2013] (1) JLR 210. *U v AG*

[2012] (1) JLR 349. DPP v P [1991] 2 AC 447. X v AG

[1998] JLR 221 . F v AG

[2016] JCA 168 . DPP v Boardman [1975] AC 421. R v Christou [1997] AC 117. R v Cannan (1990) 92 Cr App R 60. Myles v AG

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