

JERSEY / JUDGMENT

AG v Facchino [2008] JRC 014 (28 January 2008)

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JUDGMENT

THE commissioner: 1. The defendant is to stand trial by jury on 11 th February, 2008 for two counts of indecent assault, one count of gross indecency, one count of attempted sodomy, one count of attempting to procure the commission of acts of gross indecency and one count of sodomy. 2. I have been asked to determine a number of issues in relation to the admissibility of evidence but before doing so it is helpful to give a broad summary of the case against the defendant taken from the prosecution's case summary. 3. All the offences are acts of indecency against boys aged 12 and 13 or 14 years who I will refer to as A, T and J. They all occurred between May 2006 and May 2007. The defendant became friendly with these boys in 2006 when he worked at the trampoline site. They attended there regularly and the defendant gave all three of them free sessions and took two of them - A and T - to Naughty Monkeys to obtain milkshakes. He drove A and T on various occasions to the sand dunes and other places and on one occasion gave them a "spliff" made from cannabis and spice to smoke. He offered to install MSN messaging and a webcam at A's house so that he and A could communicate. It was on a visit to the sand dunes that A was indecently assaulted when the defendant held his testicles for approximately 30 seconds. 4. In the summer of 2006 the defendant commenced employment at a local school. None of the three boys attended this school. On 21 st November, 2006 the defendant either created on or downloaded to his computer a fantasy story about inter alia controlling the mind of a boy who the principal had known through his work as an employee at a school. The mind control included persuading the child to ask to be sodomised. 5. Following requests from the defendant, T met him at his home on some 30 occasions and smoked spice there on approximately 10 occasions. On one of those occasions the defendant rubbed the right leg of T and touched his penis from outside his clothing. Following this T decided to take J with him when visiting the defendant's home. J visited the defendant's home on approximately 5 or 6 occasions, the first visit being in the middle of May 2007. He normally played on the defendant's computer and on one occasion the defendant gave him £5 and a Sony Ericsson Mobile telephone. On another occasion when J was lying on the lounge floor watching a film the defendant approached him closely with his penis exposed and masturbated over his chest. Although the defendant did not ejaculate, J's t-shirt was soiled. On another occasion J bent down in front of the defendant who told him that he wanted him and found him sexy. The defendant pulled J's trousers and

underpants down, rubbed spittle around his anus pulled J towards his exposed erect penis and unsuccessfully attempted to penetrate J's anus. J elbowed the defendant in the face and fled from the house. On another occasion the defendant approached J with his trousers and pants around his ankles and his penis erect and asked him to physically masturbate him and to perform fellatio on him. J declined and, as he left, the defendant grabbed his bottom. On the final occasion that J attended the defendant's home following the exchanging of MSN messages between them, the defendant was sat in an armchair naked with only a floral sheet covering him. When J bent down in front of the defendant to pick up his mobile telephone, the defendant pulled down J's trousers and underpants and forcibly penetrated his anus. The incident lasted only a few moments. On the way home J bumped into T and was seen to be crying. 6. A few days later on 30 th May, 2007 J was walking with his mother and asked if he could use her mobile telephone to call T. During the telephone conversation T explained that he was on his way to the defendant's home. When J heard this he pleaded and shouted at T not to go. His mother noted J's reaction and was concerned. 7. When the defendant was arrested he told the officers that he had five to six images of boys having sex and 3000 to 4000 images of naked boys aged between 10 and 18. He signed the officer's notebook confirming the same. 8. Crown Advocate Fitz, for the prosecution, submits that the following questions need to be addressed in advance of the trial:- (i) are the counts properly joined in one indictment and should they be heard together? (ii) is the evidence relating to each count probative on the other counts as similar fact evidence? (iii) is the story written or downloaded by the defendant and found on his computer concerning acts of sodomy and indecency against young boys, admissible in evidence? (iv) is the defendant's admission to police upon arrest and signed statement relating to his possession of indecent images of children admissible in evidence? (v) is evidence of J's distress upon hearing that a friend was due to visit the defendant admissible? (vi) is the allegation that the defendant gave the boys cannabis admissible? (vii) what is the impact of the defendant putting his character in evidence? 9.

Questions

- (i) and (ii) can be taken together. Rule 3 of the Indictment Rules 1972 states:- "charges for any offences, whether crimes, delicts or infractions, may be joined in the same indictment if these charges are founded on the same facts or form or are part of a series of offences of the same or a similar character". 10. I agree with Crown Advocate Fitz that these offences are part of a series of offences of the same or similar character and are therefore rightly joined in the same indictment. No objection to this has been raised by Advocate Grace for the defence. 11. Is there sufficient connection between the circumstances spoken of by the three boys in the present case for their testimony to mutually support each other (what is described as "similar fact evidence"). Crown Advocate Fitz submits that there is sufficient connection and Advocate Grace takes no issue on the point. The leading case in relation to similar fact is the decision of the House of Lords in DPP -v-P

[1991] 2 AC 447 (HL), where it moved away from restricting the circumstances in which there is sufficient probative force to overcome the prejudice of evidence relating to another crime, to cases in which there is some striking similarity between them. Lord Mackay in the sole speech delivered said that in the case of this kind:- "the judge must first decide whether

there is material upon which the jury would be entitled to conclude that the evidence of one victim, about what occurred to that victim, is so related to the evidence given by another victim, about what happened to that other victim, that the evidence of the first victim provides strong enough support for the evidence of the second victim to make it just to admit it notwithstanding the prejudicial effect of admitting the evidence. This relationship, from which support is derived, may take many forms and while these forms may include "striking similarity" in the manner in which the crime is committed, consisting of unusual characteristics in its execution the necessary relationship is by no means confined to such circumstances. Relationships in time and circumstances other than these may well be important relationships in this connection". 12. In this case the defence involves a denial of the truth of the accounts given by the three boys whether it is said that they are mistaken or lying and the authors of Archbold give practical assistance to the approach that I should take (paragraph 13-25): "in such cases, the task of the judge will be to assume that the evidence of the witnesses is true (R. V. H. [1995] 2 A. C. 596 HL), and then ask himself whether explanation of the common allegations on the basis of chance or coincidence would be an affront to common sense. No particular degree of similarity is required. The reality is that independent people do not make false allegations of a like nature against the same person." 13. Crown Advocate Fitz says the similarities in the circumstances spoken of by the three boys are as follows:- (a) the defendant had met the three boys whilst working at the trampoline site; (b) he gave all of them free trampoline rides, took two of them to Naughty Monkeys and the sand dunes, gave them all spice, gave one £5 and a phone, offered another a WebCam and took two of the boys to his home. (c) all the children were male and of a similar age, between 12 and 14 years. 14. Assuming the evidence of the three boys is true, then in my view explanation of the common allegations on the basis of chance or coincidence would be an affront to common sense and accordingly I agree that the evidence of each of the three boys is admissible to support the evidence of the other or others of them. 15. Questions (iii) (the story) and (iv) (the photos) can also be taken together. The prosecution case is that the defendant created the story found on his computer. This is denied by the defendant who will admit only that it was on his computer, I presume downloaded from elsewhere. I am going to approach this matter firstly on the basis put forward by the defence. The story is some 13 pages long and involves intensely graphic, and I have no doubt what an average juror would regard as shocking, descriptions by a 21-year-old employed in IT at a school in California of fellatio by and sodomy with pliant and controlled young boys of similar ages to those of the three boys in this case. Crown Advocate Fitz accepted that there was no prospect of a dispassionate consideration by the jury if the story is given to them as written and agreed that its contents, if admitted, would therefore be summarised. 16. Counsel agreed that there is a general rule that evidence which merely shows propensity is not admissible but Crown Advocate Fitz asserts that this disputed evidence is admissible as being relevant to issues in the case i.e. innocent association (the defendant's presumed stance that he did socialise with these three boys but did so for innocent reasons); motive and intent and generally to counter a false impression given by the defendant. 17. The starting point is the

opinion of Lord Herschell in *Makin-v-AG* for New South Wales

- (1894) AC 57 ,PC:- "it is undoubtedly not competent for the prosecution to adduce evidence tending to show that the accused has been guilty of criminal acts other than those covered by the indictment for the purpose of leading to the conclusion that the accused is a person likely from his conduct or character to have committed the offence for which he is being tried. The mere fact that evidence adduced tends to show the commission of other crimes does not render it inadmissible if it be relevant to an issue before the jury, and it may be so relevant if it bears on the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental or to rebut a defence which would be otherwise open to the accused. The statement of these general principles is easy, but it is obvious that it may often be very difficult to draw the line and to decide whether a particular piece of evidence is on the one side or the other". 18. Both counsel referred to the more recent decision of the English Court of Appeal in *R v Wright*
- [1990] Cr. App. R. 325 which involved a headmaster of a school charged with offences of buggery and gross indecency with pupils at the school. The defendant's case was a complete denial of the allegations. He asserted that the boys themselves had been engaged in homosexual activities and that fearful of discovery and punishment they had concocted the story which made the defendant the seducer and ringleader. Two incriminating articles had been admitted into evidence namely a magazine entitled "The Incognito Guide to Paris" which although containing no pornographic material was immediately recognizable as being aimed at males with homosexual leanings and in particular those with an interest in young men and a grossly obscene video consisting of displays of buggery between two or more adult males. There were issues concerning the connection between these articles and the defendant in that the study in which the magazine had been found was in effect a social common room used by pupils and teachers alike and the video was found in his home some eight months later. He denied that either article were his. 19. In his judgment Lord Mustill started with the principle set out in the opinion of Lord Herschell in *Makin* referred to above and, as Lord Herschell himself acknowledged, made it clear that the principle was subject to exceptions. Thus if a person accused of indecently touching a child admits the contact and asserts that it was accidental, evidence of previous similar acts can be admitted, because it is relevant to the issue of accident or design. The same would apply if there is a defence that the acts *prime facie* applicable to guilt in fact had an innocent explanation. Also, and relevant to this case, such evidence may be permitted where it goes to disprove a defence that an association with the complainant bears an innocent explanation. Although accepting that these exceptions were well-established, Lord Mustill said it was quite clear that they are not brought to play simply through a denial that the acts in question ever happened at all. In that case the defendant had not raised any defence of the types mentioned: he did not admit the incidents whilst denying that they involved any criminality on his part. He asserted that the boys had made them up. In argument at the trial counsel for the prosecution had asserted that the book was "strong probative evidence that he was a homosexual" . Lord Mustill found that the

authorities showed that this is not an admissible ground for admitting such evidence. 20. Crown Advocate Fitz submitted it was logical for Lord Mustill in Wright to say that the exceptions are not bought in to play simply through a denial that the acts question ever happened at all, where the defendant and the complainant had a reason to associate, as in Wright where the defendant was a headmaster and the complainants his pupils. In such a case it would be inappropriate to adduce evidence of homosexual tendencies on the part of a headmaster as knowledge of this might well have inspired false allegations. 21. The authors of Archbold 2002 edition (being the edition prior to the introduction in England of the Criminal Justice Act 2003) at paragraph 13-32 submitted that there should be no different principle for cases where the nature of the defence is a complete denial (though the application thereof may lead to a different result):- "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 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)". 22. In the present case the defendant was not a stranger to these boys but nor was he within the type of groups mentioned by Archbold (headmaster etc) which would give him a reason to be so associating with them. He did however have a perfectly legitimate reason to have known the complainants in the first place namely through his work at the trampoline site. 23. Advocate Grace argued that the prosecution gave too wide an interpretation to the expression "innocent association" so as to include the broader circumstances. The word "innocent" should be limited to the actus reus

- I may have committed these acts but I have an innocent explanation. Lord Mustill in Wright was correct to say that the nature of the defence was relevant and Wright had been followed in R-v- B (RA)

- [1997] 2 Cr. App. R. 88 and R-v- Glen Simons
- [2005] EWCA Crim 1284 notwithstanding the criticisms voiced in Archbold 2002 edition. 24. R-v- Horwood
- [1969] 53 Cr. App. R.619 was a case involving the defence of innocent association. The defendant, a complete stranger, had picked up the complainant in his car and driven him to a forest where the alleged act of indecency took place. Evidence had been admitted at the trial as to the defendant's past homosexuality. O'Connor J giving the judgment of the Court of Appeal said:- "Assuming that the expression "I am a homosexual" does not necessarily convey that the defendant has committed homosexual offences, it must be only in very exceptional circumstances that evidence of this nature can be admitted to rebut innocent association. King (Dennis Arthur) (supra) [R v Dennis Arthur King (1967) 51 Cr. App. R. 46] was an exceptional case; the admitted facts were such that the admission that the defendant was a homosexual could properly be said to be relevant to the issue before the jury. In our judgement, that decision cannot be taken as authority for the proposition that in all cases where a man is charged with a homosexual offence he may be asked either by the police or in the witness box the question "are you a homosexual?" In cases where identity is not in issue the occasions on which such evidence can properly be admitted must be very a rare." 25. In R -v- Gray
- [2002] EWCA Crim 1047 the defendant met the young complainant through a website. He took the complainant to a hotel bedroom where it was alleged he was shown a number of homosexual magazines of an explicit nature showing, amongst other things, oral and anal intercourse and was given a dildo to use on himself to assist the defendant ultimately to penetrate him. The defendant maintained that it was an innocent meeting. At his home the police found a large amount of explicit material and a dildo. The judge admitted the material in edited form before the jury and the defendants possession of the dildo, having indicated to the jury that the Crown's case was that the material in the possession of the defendant at his house was of a similar nature to material which was shown to the complainant in the hotel room. This together with the possession of the dildo was evidence which could assist the jury in resolving the issue of credibility as between the defendant and the complainant. 26. The Court of Appeal agreed that in determining the issue of credibility, it was relevant to the jury's consideration that pornographic material similar to that found in the possession of the defendant had been used, according to the complainant, to stimulate sexual activity. It was material which was capable of helping the jury to decide whether or not the complainant was telling the truth about what the defendant did in the hotel room that day and accordingly went to an issue in the case. It was not evidence that was admitted for the purposes of establishing propensity and the jury were directed in forceful terms by the judge not to allow themselves to use the material as evidence of propensity. 27. Thus in Gray the admission of this evidence was not permitted on the broader ground that it was justified in order to rebut the defence of innocent association but because of the link between the material found in the

defendant's home and the material allegedly used with the complainant in the hotel room. 28. Both counsel agree that the test I have to apply is that established in DPP-v-P namely whether the probative force of the evidence outweighs the prejudicial effect. 29. I have not found the exercise an easy one. The draft admissions which I believe had been agreed show that the defendant admits meeting and associating with the boys as described in the above summary. The defence would appear to be a simple and complete denial that the acts of indecency alleged by the boys took place. Referring back to the passage from Archbold referred to in paragraph 18 above, these boys were not strangers to the defendant. It would seem likely from their statements that he was a homosexual or became known to them to have a homosexual propensity and if he has been picked on for these reasons there would be no coincidence factor in the discovery of the story and the admission as to the photos. 30. If the story and the admissions of the photos are admitted in evidence the jury will be very likely to conclude that the defendant is predisposed to indecent behaviour with young boys and it is clear from the authorities that such evidence is inadmissible unless it is also relevant to an issue before the jury. It is not relevant to the issue of credibility which will be the main issue before this jury. There is no link (that has been drawn to my attention) between the story and the admission as to the photos and the acts alleged to have taken place as in Gray which will assist the jury on the issue of credibility. It could only be relevant to a defence of innocent association. I can understand the distinction Mrs Fitz makes between say the headmaster in Wright and the complete stranger in Horwood but even in Horwood the English Court of Appeal found evidence of past homosexuality inadmissible and made it clear that such evidence would only be admissible in rare cases. 31. Is this a rare case that this evidence should be admitted? Crown Advocate Fitz argued that the graphic story of sodomy against young boys and the admission as to the photos is far more probative than say the evidence of homosexuality in Horwood. However it is clear that in Gray the very explicit material in the possession of the defendant would not have been admitted to rebut the defence of innocent association but for the link between that material and material used with the complainant. Crown Advocate Fitz accepts that the graphic story cannot be shown to the jury. What the jury will be shown, if the evidence is admitted, is a summary which, as with the video in Wright, will necessarily be in brief and clinical terms. I am not persuaded that this combined with the admission as to the photos is so probative as to outweigh its prejudicial effect. 32. Whether or not there is a different principle for cases where the nature of the defence is a complete denial, applying the test in DPP-v-P to the facts of this case, I conclude that the prejudicial effect of this evidence outweighs its probative value. 33. Crown Advocate Fitz further submitted that motive is always admissible in order to show that it is more probable that the accused committed the offence charged. She relies on the following passage from Archbold 2002 edition paragraph 13-34: "Although the prosecution does not have to prove motive, evidence of motive is always admissible in order to show that it is more probable that the accused committed the offence charged. The position is well stated in a dictum of Lord Atkinson during argument in R v Ball

[1911] AC 47, HL: "surely in an ordinary prosecution for murder you can prove previous acts or words of the accused to show that he entertained feelings of enmity towards the deceased, and this is evidence not merely of the malicious mind with which he killed the deceased, but the fact that he killed him. You can give in evidence the enmity of the accused towards the deceased to prove that the accused took the deceased's life. Evidence of motive necessarily goes to prove the fact of the homicide by the accused, as well as his "malice aforethought," inasmuch as it is more probable that men are killed by those that have some motive propelling them than by those who do not" (at p.68) As Ball was a case of incest, it is clear that Lord Atkinson's remarks were of general application, and not confined to murder" 34. In my view possession of the story and the admission as to the photos go to propensity and are not evidence of a desire to commit or reason to commit the acts alleged by the boys. If that were the case then pornographic material often found in the possession of defendants in cases such as these would routinely be adduced for that purpose. 35. I have therefore concluded that evidence of the story and admissions as to the photos are not admissible as part of the prosecution case. 36. Is the position different if it can be proved that the defendant was the author of the story? Advocate Grace indicated in his oral submissions that the position of the defence would more difficult in that eventuality but I conclude that the position is the same. What is the difference between someone who has a propensity to buggery with boys reading and watching material depicting buggery written or produced by others and another person with the same propensity who writes such material? I cannot see any difference. They both have the same propensity and in my view it makes no difference to the probative value of the story. 37. Question (v). The issue of the evidence of J's distress upon hearing that T was to visit the defendant is in discussion between the prosecution and the defence and will be dealt with later. 38. Question (vi). The defendant has been charged with supplying cannabis to the boys and has pleaded not guilty to the charge. The matter we will be dealt with at a subsequent trial. The allegation that the defendant had supplied cannabis forms part of the circumstances spoken of by the three boys and on the prosecution case constitutes part of the grooming process. It is relevant for that purpose and the defence do not take issue with its admission notwithstanding that it shows criminal conduct which is not subject to a charge in the current trial. 39. Question (vii). The prosecution contend that evidence of the story and the admission as to the photos should be admitted in any event if the defendant adduces evidence of his good character and this in accordance with the provisions of Article 2 the Loi (1908) au sujet des Temoins et Informateurs which are closely modelled on Section 1 of the Criminal Evidence Act 1898. The defendant cannot be required to answer any question tending to show that he has committed or been convicted or been charged with any offence other than the offence of which he is then charged or is of bad character unless he has called witnesses to establish or given evidence of his good character. The prosecution have rightly raised the issue now as they have been put on notice by the defence of that it may be putting the defendant's character in issue. 40. Crown Advocate Fitz submits that the defendant cannot put in evidence only part of his character. He cannot seek to call evidence of, say, his honesty without rendering himself subject to rebuttal on the evidence

of his sexual immorality. The authority for that proposition is the case of *Stirland-v-DPP*

[1944] AC 315 in which the defendant having put his character in issue asserted in examination-in-chief that he had never been "charged" with any offence. In cross-examination questions were put to him in relation to a suspected forgery at his previous employers. Lord Simon explained that if an accused person in the witness box makes a statement of fact which the prosecution does not accept, he is liable to be cross-examined on the statement with a view to showing that it is not true and this applies to a statement as to the accused's past record where he put his character in issue just as much to a statement on any other matter. Questions whether his former employer had suspected him of forgery were not, therefore, any challenge to the veracity of what he had said, nor was it relevant to disprove good character as the most virtuous may be suspected and an unproved accusation was nothing against the accused. The question should not have been put. He said this in his judgment:- "There is perhaps some vagueness in the use of the term "good character" in this connection. Does it refer to the good reputation which a man may bear in his own circle, or does it refer to the man's real disposition as distinct from what his friends and neighbours may think of him? In *Reg. -v- Rowton* on a re-hearing before the full Court, it was held by the majority that evidence for or against a prisoner's good character must be confined to the prisoner's general reputation, but *Erle C. J.* and *Willes J* thought that the meaning of the phrase extended to include actual moral disposition as known to an individual witness, though no evidence could be given of concrete examples of conduct. In the later case of *Rex v Dunkley*, the question was further discussed in the light of the language of the section, but not explicitly decided. I am disposed to think that in para. (f) (where the word "character" occurs four times) both conceptions are combined". 41. The authors of *Archbold* 2002 edition state that the meaning of the word "character" in this context has never been conclusively pronounced upon but said that the broad interpretation expressed by Lord Simon namely that it covers not only reputation but real disposition is the correct one. 42. I see no reason why the expression "bonne reputation" in article 2(2) (c) of the 1908 Law which equates to the "good character" in section 1 of the 1898 Act should be restricted to the defendant's general reputation as opposed to his actual moral disposition. If he elects to put his character in issue and present himself through his own evidence or through the evidence of witnesses as a person of good character then the prosecution must be entitled to put to him evidence to controvert that positive case (see *Wright* page

333) namely the story and his admission as to the photographs. Without that the jury will not have a fair and balanced picture of the defendant's character which he has elected to put before them. 43. I therefore find that if at the trial the defendant puts his character in issue, the prosecution may put to him evidence in relation to the story and the admissions as to the photos to controvert that positive case. *Authorities* *Indictment Rules* 1972. *DPP -v-P* [1991] 2 AC 447 (HL). *Archbold* 2002. *Makin-v-AG for New South Wales*

(1894) AC 57, PC. R v Wright [1990] Cr. App. R. 325. Criminal Justice Act 2003. R-v- B (RA) [1997] 2 Cr. App. R. 88. R-v- Glen Simons

[2005] EWCA Crim 1284 . R-v- Horwood [1969] 53 Cr. App. R.619. R -v- Gray [2002] EWCA Crim 1047. Loi (1908) au sujet des Temoins et Informateurs. Criminal Evidence Act 1898. Stirland-v-DPP [1944] AC 315. Page Last Updated: 16 Mar 2017 BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII

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