

JERSEY / JUDGMENT

AG v Goodchild [2023] JRC 176 (29 September 2023)

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JUDGMENT

THE DEPUTY BAILIFF: 1. On 7 September 2023, I gave a ruling in relation to the Crown's application to introduce evidence of the Defendant's bad character in this case pursuant to the provisions in the Police Procedure and Criminal Evidence (Jersey) Law ("the Law"). I now give my reasons for the ruling that I gave. The facts 2. In short, the Defendant has pleaded not guilty to grave and criminal assault and larceny. The Crown's case is that at approximately 2.30 am on 12 September 2022 the Defendant, together with his co-defendant Addison Mazurke, committed a grave and criminal assault in King Street, St Helier, upon the complainant who was prior to the assault unknown to both the Defendant and Mr Mazurke. The assault was a serious one leaving the complainant with a fractured left collarbone. The complainant was knocked to the floor and punched and kicked on the floor. After the assault his shoes were taken. Both defendants are charged with assault and larceny. Mr Mazurke admits presence and inflicting a common assault upon the complainant but denies grave and criminal assault and larceny. The Defendant denies he was present and in his defence case statement says that at the time of the alleged assault he was indoors at the address of a friend. The Crown rely on the identification evidence of a police officer who has viewed various CCTV footage of the Defendant and Mr Mazurke and recognised the Defendant from school; the fact that the Defendant and Mr Mazurke were out in St Helier together at about the same time the following night and that on that occasion trainers and a cap were seized from the Defendant which the Crown say are similar or identical to those that the CCTV footage shows that the Defendant was wearing the previous night. The Crown also rely on the fact that in his second interview the Defendant denied knowing Mr Mazurke which the Crown say was plainly false. The application 3. The Crown seek to adduce various previous convictions of the Defendant for assault and for drunk and disorderly behaviour committed between 2008 and 2022. I will return to the detail of those convictions, when necessary, below. 4. The Crown's written application to introduce the evidence of the Defendant's bad character says that the convictions show the Defendant has a propensity to commit offences of the kind with which he is charged and accordingly rely upon Article 82F of the Law. 5. The Crown said that the bad character evidence was relevant to a matter in issue, accepting that the key issue in this case, so far as the Defendant was concerned, was identity. The complainant had no recollection of who assaulted him owing to the injury and intoxication. The Crown say that its case on identity was

strong and that the Defendant's record demonstrating a history of violence and in particular attacks on unknown males was evidence that may assist to establish, if the jury accept it, that: (i) the Defendant has a propensity to commit offences of the nature of which he is accused; and (ii) the evidence may support the accuracy of identification of the police officer who knows the Defendant and the other identification evidence, as it would be a coincidence if there were to be a number of men with a propensity to attack strangers bearing a close resemblance to the Defendant. 6. Before looking at the authorities, it is appropriate to recite the defence argument in response to the Crown's submission. The defence argued that the previous convictions would unfairly prejudice the Defendant in his defence to these charges and that the essential issue for the jury was identification, not propensity. As the issue was identification and not propensity, all the jury needed to see was the CCTV footage and the evidence relevant to identity upon which the Crown sought to rely. The introduction of this character evidence would have such an adverse effect on the fairness of the proceedings that the Court ought not to admit it under Article 82E(2). Furthermore, in relation to the specific offences which the Crown sought to admit, the offences of drunk and disorderly were irrelevant and the Crown in any event had not provided or sought to rely upon the circumstances of the three convictions for being drunk and disorderly. 7. It is argued that the offence of domestic violence on 18 June 2014 is of a different character to a sufficient degree to render it irrelevant. 8. It is accepted that the offences involving attacks on strangers were or may be relevant to the issue of propensity but that was not the principal issue in this case - namely the issue of presence / identity with the Defendant relying on alibi. The defence accepted that this was not a case of the Crown attempting to adduce character evidence in order to bolster a weak identification case, but argued that the admission of this evidence would be unfair in all the circumstances of the case. 9. The defence argued, a matter not foreshadowed in the documentation filed prior to the hearing, that the evidence of the Defendant and Mr Mazurke conversing with police officers approximately twenty-four hours later when they were again out together (on the Crown's case) on the streets of St Helier and when drunk, unhelpful (for the police) and disorderly should not be adduced. It is argued that this too was evidence of bad character, including evidence at the end of the body worn footage of the Defendant being arrested on suspicion of assault. 10. The Crown's case was this was not evidence of bad character but relevant evidence and therefore admissible at customary law. If it was evidence of bad character, then it was relevant to the issue of identification because it shows the two defendants: (i) together (relevant to the fact that they appear to deny knowing each other); (ii) out in St Helier at 2.30 am twenty-four hours after the assault; (iii) drunk and in some respects disorderly; and (iv) the Defendant wearing the same hat and footwear as he was wearing the previous night. 11. It was also argued that this evidence might amount to important explanatory evidence under Article 82E without which the jury would not understand how it was the police came to seize the footwear and hat of the Defendant. 12. The Crown agreed that the evidence was prejudicial, as is often the case with prosecution evidence, but it was not unfairly so and should be admitted, notwithstanding Article 82E(2). 13. With those arguments in mind, I now turn to consider the authorities that were placed before me. The case 14. My attention was drawn by the Crown to the 2023 edition of Archbold which, at paragraph 13-40, consider the English legislation directly equivalent to the corresponding Jersey gateway for the admission of bad character

evidence, namely where the defendant's bad character is admissible as it is " relevant to an important matter in issue between the defendant and the prosecution " and says: "A matter frequently 'in issue' in contested cases, especially those arising from violence incidents in public places, is identity; and it is well-established that evidence of the defendant's bad character is now admissible against him in this situation; see inter alia Brima [2006]...; Eastlake

[2007] EWCA Crim 603 and Spittle

[2008] EWCA Crim 2537 . However, this is subject to the general rule...that evidence of bad character may not be adduced to bolster a weak case." 15. Archbold goes on to observe that a matter in issue for the purpose of this gateway may be the entirety of the prosecution case or some component part of it. At paragraph 39-42 Archbold says: "As well as cases where the bad character evidence does not show propensity at all, there are cases where it incidentally does so, but this is not its main relevance. Rather similar are the cases where a witness W identifies D as the person whom they saw committing an offence, and unknown to W, D has a record for committing this sort of crime. In such case, D's record makes it much more likely that W's identification was correct, because it would be a remarkable coincidence if the person W wrongly identified happened to be someone who was in the habit of committing this offence; and long before [the relevant English statute] relaxed the rules about propensity evidence the Courts would admit it for that reason... But if the unlikelihood of coincidence is important here, in reality propensity comes into the reasoning as well. In such a case the correct analysis, surely, is that there are two pieces of evidence that link D to the offence: (i) the fact that W identified them and (ii) D's record which shows their propensity to commit this sort of crime. And if W was unaware of D's record, the second piece of evidence then strongly reinforces the first." 16. As to the authorities in respect of the admission of bad character evidence in identity cases, I was referred to the cases of Eastlake and Spittle

- both referred to in the extract from Archbold above. 17. Eastlake was a decision of the Criminal Division of the English Court of Appeal where the trial judge certified grounds of appeal asking whether evidence of propensity to commit offences was capable of supporting the accuracy and reliability of identification evidence when identification was the only issue in the case. 18. In Eastlake , the two complainants were set upon by three males including, the Crown said, the two appellants. Both said they were not involved in the attack and were elsewhere at the time. They relied upon alibi at trial. The Crown sought leave to adduce evidence of their bad character by way of propensity for violence pursuant to the English equivalent legislation and the judge allowed the application. 19. Both appellants (brothers) had previous convictions for common assault - one brother had convictions for street violence and the other for convictions of common assault with the circumstances unparticularised in the judgment, save that two were offences committed with his brother. 20. The judgment of the Court was given by Dame Heather Steel: "16. Before us, counsel for both defendants (Mr Bloomfield on behalf of Kevin Scott Eastlake and Mr Walker on behalf of Nicky Eastlake who adopted his arguments) have renewed those submissions. But they

also put their argument in another way: that the bad character evidence was not relevant at all. The submission is that the issue in this case was one of the correctness of the accuracy and reliability of the identification evidence; that the bad character evidence should not have been admitted because it was not relevant to that issue; and that it should have been excluded on the ground of lack of relevance. Mr Bloomfield develops the argument before us in this way. The defence was alibi. The appellants deny that they were present at the time of the offence. The jury's task was to assess, in the light of all the evidence, whether they were sure of the accuracy and reliability of the identifications. There was no dispute at the trial that the victims were attacked. The two men who attacked them (whoever they were) were the sole aggressors. The bad character evidence, if it indicated a propensity at all, indicated a propensity to be an aggressor. Since the defence here was that the appellants were not present, the character evidence was not relevant. We do not accept this submission. The jury had to decide whether the two appellants were the two young men who committed the offence. The evidence of bad character was capable of establishing that they had a propensity to commit an offence of street violence, and to do so together. That evidence was capable of lending support to the conclusion which the Crown invited the jury to reach, namely that the two appellants were correctly identified as those who committed the attack. This is so even though there was no dispute in the trial that those who committed it, whoever they were, acted as aggressors." 21. The Court of Appeal was content with the direction that the trial judge gave to the jury: "26. The safety valve is of course the giving of proper directions to the jury. There is some criticism of other parts of the summing-up made by Mr Walker on behalf of Nicky Eastlake, but none by either counsel of the directions relating to the bad character evidence. These are clear at page 8 of the summing-up when the judge directed the jury as follow: 'In this case you have heard each defendant has previous convictions for assault. Now, it is important that you should understand why you have heard that evidence and how you may use that information. I will explain in more detail, but you must not convict either defendant simply because he has a bad character. You have heard of those convictions because the prosecution submit they indicate a propensity to commit offences of violence similar to that with which each defendant is charged. The prosecution submit to you that that is a relevant matter to bear in mind when assessing whether or not the identifications can be relied on, because the witnesses have not identified two apparently law-abiding members of the public but two naughty boys who have engaged in street violence in the past. As I have said, bad character cannot of itself prove guilt. It would therefore be quite wrong for you to jump to the conclusion that either defendant is guilty just because of his previous convictions, but in the context of this case it is simply an additional factor for you to weigh up when considering whether those identifications are accurate. You have to decide to what extent, if at all, you are assisted by the knowledge of those convictions.' The jury having been given those directions in clear terms in a concise summing-up, we conclude that the admission of the bad character evidence does not render these convictions unsafe." 22. Accordingly, it appears that in that case, as in this, a Turnbull direction will be given in the usual way, but a matter for the jury to weigh in the balance (if this evidence is admitted) when considering the disputed

identifications are the previous convictions for violence. The judgment in Eastlake at paragraph 31 noted the requirements of a Turnbull direction which were helpfully summarised as follows: "Ground 3 is that the judge failed adequately to deal with the circumstances of the identification. In Turnbull the court identified three main requirements where a case depended wholly or substantially on the correctness of identification:

- (1) The judge should warn the jury of the special need for caution before convicting the defendant in reliance on the correctness of the identification.
- (2) The judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made.
- (3) He should remind the jury of any specific weaknesses which had occurred in the identification evidence." 23. In *R v Spittle* the Criminal Division of the English Court of Appeal considered the evidence of a police officer who noticed a vehicle being driven at excessive speed by a male driver. The police officer in question told his colleague he recognised the driver, that he could not put a name to him but he had seen him earlier in the year. After the incident, the constable returned to the police station and identified the defendant from photographs of the driver. He repeated that identification on a video identification procedure thereafter, as did his colleague. The trial judge permitted the Crown's application to admit evidence of three previous convictions for driving whilst disqualified. The defendant submitted that the trial judge should withdraw the case from the jury on the ground that the identification evidence was so poor there was no case to answer. He declined to do so. 24. Giving the judgment of the Court, Dyson LJ said: "16. We turn to the next point which concerns the admission of the previous convictions for driving whilst disqualified. This was the point which troubled the full court and was the only point which the full court considered justified giving leave to appeal, although they did not restrict the appellant as to the points that could be taken on his behalf. The concern expressed by the full court was that the reason for admitting the evidence of previous convictions was that they showed that the appellant had a propensity to drive whilst disqualified and that this supported the identification evidence of the officer that the appellant was in fact driving the car on 27th July. The full court said that it was arguable that the three previous convictions for driving whilst disqualified were of no assistance to the jury on the only issue in the case, namely whether the police officers had correctly identified the driver. In expressing that view, the full court clearly did not have in mind a previous decision of this court in the case of *R v Eastlake*

[2007] EWCA Crim 603 . In that case the trial judge had certified this question:..... In the light of this decision, it is clear that there is no substance in the point which the full court considered to be arguable. It was not clear to us whether Mr Harris was seeking to adopt the argument identified by the full court, but if and to the extent that he was, we reject it. As to the other point made by Mr Harris, we do not understand how the fact that the case was really about dangerous driving rather than driving whilst disqualified takes

the appellant's case anywhere. The only issue in the case was whether the appellant was the driver of the vehicle and that was relevant to all three charges. The relevance of the previous convictions was that it went to support the evidence of identification. Therefore the fact that the most important and serious charge which the appellant faced was the dangerous driving is not to the point." The relevant convictions 25. As to the previous convictions that the Crown seek to adduce involving violence against the person they are, where particularised by the Crown (two of the three drunk and disorderly convictions have not been particularised): (i) Common assault in August 2012 - an unprovoked assault on a stranger late at night when the Defendant was under the influence of alcohol; (ii) In June 2014, common assault and resisting arrest - a domestic assault where the Defendant attended his ex-partner's address in the early hours of the morning whilst under the influence of alcohol, got into her property and assaulted her by punching her and was aggressive on arrest. (iii) In July 2016, grave and criminal assault on a stranger when the Defendant was under the influence of alcohol following a disagreement outside a public house. (iv) In January 2019, an offence under the Crime (Disorderly Conduct and Harassment) Law where the Defendant was located outside a flat, intoxicated, and was aggressive towards the police and ambulance staff, shouting at an ambulance worker and hitting him on the leg. (v) In November 2022, common assault - an unprovoked assault on a stranger late at night when the Defendant was under the influence of alcohol, having been ejected from a nightclub in St Helier. The statutory provisions 26. Under Article 82E of the Law the relevant provisions are as follows: "82E Defendant's bad character

- admissibility of evidence¹¹²

- (1) In criminal proceedings, evidence of the defendant's bad character is admissible if, but only if: (c) it is important explanatory evidence; or
- (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." 27. Bad character evidence is defined in Article 82C of the Law as follows: "References in this Part to evidence of a person's 'bad character' are to evidence of, or of a disposition towards, misconduct on his or her part, other than evidence which -
 - (a) has to do with the alleged facts of the offence with which the defendant is charged; or
 - (b) is evidence of misconduct in connection with the investigation or prosecution of that offence." 28. "Misconduct" is defined in Article 82A(1) as " the commission of an offence or other reprehensible behaviour". 29. In respect of propensity, Article 82F provides: "82F Matter in issue between the defendant and the prosecution
- (1) Subject to paragraph (2), evidence of a defendant's bad character is admissible if it is relevant to an important matter in issue between the defendant and the prosecution which includes -

- (a) the question whether the defendant has a propensity to commit offences of the kind with which he or she is charged, except where the defendant having such a propensity makes it no more likely that he or she is guilty of the offence; or
- (b) the question whether the defendant has a propensity to be untruthful, except where it is not suggested that the defendant's case is untruthful in any respect." 30. Finally, Article 82E(2) provides: "(2) The court must not admit evidence under Article 82F or Article 82G if, on an application by the defendant to exclude it, it appears to the court that the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.
- (3) On an application to exclude evidence under paragraph (2) the court must have regard, in particular, to the length of time between the matters to which that evidence relates and the matters which form the subject of the offence charged." Decision 31. It has been established that where propensity to commit an offence relied upon, there are three questions for the Court to consider: (i) Do the convictions in question establish a propensity to commit the offence of the kind charged? (ii) Does that propensity make it more likely the Defendant committed the offence charged? (iii) Is it unjust to admit the convictions and in any event will the proceedings be unfair if they are admitted? 32. In my judgment, the convictions to which I have referred that are particularised by the Crown (I exclude the drunk and disorderly offences) are relevant to the matter in issue in the case, do establish a propensity to commit offences of the kind charged and that propensity makes it more likely the Defendant committed the offences charged in this case. 33. It is clear from the authorities referred to that the fact that the issue in this case is identification does not render the convictions inadmissible. Although it is not necessary for there to be a similarity between the offences the Crown seek to rely on and the offence charged, there is a similarity between many of the convictions referred to in this case which involve attacks on strangers which this case, on the Crown's case, was. 34. These convictions may strengthen the evidence of identification if the jury accept that they do so. The evidence of bad character is capable of establishing that the Defendant had propensity to commit the offence of street violence with which he was charged. 35. In respect of the Court's power to exclude evidence prima facie admissible under Article 82F, I am of the view that the admission of the conviction for domestic violence is unnecessary and, in the circumstances, would have such an adverse effect on the fairness of the proceedings that the Court ought not to admit it and that conviction and its circumstances are excluded. 36. As to the events of the following night captured on body worn camera footage, which I have viewed, I agree with the defence submission that this is bad character evidence. It is not evidence which has to do with the alleged facts of the offence with which the Defendant is charged but does amount to reprehensible behaviour by reason of the conduct of both defendants as revealed by the video evidence. If I am wrong on this issue then I agree with the Crown that the material is prima facie admissible as relevant evidence by virtue of the general customary law principle that all relevant evidence is admissible. Having said that, the body worn camera footage is extensive and it would be inappropriate for the jury to give too much weight to its content.

Accordingly, I directed when ruling that the evidence was admissible that the footage needs to be edited in order to be of sufficient length to allow the jury to be able to assess the Defendant's appearance and clothing including his footwear and hat the night after the alleged assault, and to enable them to have sufficient opportunity to consider the demeanour of both defendants. Authorities Police Procedure and Criminal Evidence (Jersey) Law 2003. Archbold Criminal Pleading, Evidence and Practice. Crime (Disorderly Conduct and Harassment) Law R v Eastlake

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