

JERSEY / JUDGMENT

AG -v- Goss [2005] JRC 082 (08 June 2005)

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JUDGMENT

THE DEPUTY BAILIFF: 1. Although the matter was argued the other way round I propose to give my decision first in relation to the medical evidence. 2. The Defendant faces a charge that he murdered Michelle Gibson with whom he had been having an on/off relationship for sometime. He will apparently admit to killing her on 21 st May, 2004, but will contend that he should be convicted of manslaughter, rather than murder, on the basis of provocation. 3. The law on that topic is currently under review by the Privy Council, but until then, as laid down in the case of *Holley -v- A. G.* (25 th October

2001) *Jersey Unreported*; [2001/210], (*Holley -v- A. G.* [2003]JLR22), the law which we must follow is that established in the case of *R -v- Smith (Morgan)* [2000]3. W. L. R.654. That case provided that, when considering whether the defendant lost his self-control, and in further considering whether it was reasonable for him to do so, the jury may take into account any particular characteristics of the defendant which might bear on these two aspects 4. The defence wish to adduce evidence from two medical experts: Professor Gudjonsson, a Psychologist; and Professor Eastman, a Psychiatrist. I have been shown very lengthy and detailed reports that, in a nutshell, both conclude and would give evidence to the effect that the Defendant does have certain such characteristics, namely an avoidant and a schizoid personality disorder or personality trait. Both of these are substantially related to the events of his childhood. 5. The parties are agreed on the general approach as to the admissibility of expert evidence that is summarised in Archbold paragraph 4-326 and, in particular, as laid down in the case of *Turner*

(1975) 650 Cr. App. R. 80. In essence, expert opinion is admissible where it relates to matters which the jury could not be expected to be aware of from their own day to day knowledge, but expert evidence is not admissible to deal with matters which the jury could be expected to be familiar with and be able to deal with on their own. 6. The Prosecution accept that, in essence, the report of Professor Gudjonsson is admissible, because it does deal with the alleged characteristics and how these might impact on provocation and these are not matters which the jury could be expected to be aware of on their own. However, Mr Whelan submits that three particular aspects of the Report should be excluded. 7. First he refers to an interview which Professor Gudjonsson held with the Defendant's brother Darren Goss. This, in effect, according to the Professor, corroborated the Defendant's

version of his childhood events. In the end I think Mr. Whelan accepted that it could not be right to say that this was inadmissible in the sense that, just as with the story given to the Professor by the Defendant himself, the Report can properly set out the information upon which it is based. Clearly that information has eventually to be proved by admissible evidence and what the Defendant or Darren Goss said to the Professor is not admissible evidence, it is hearsay. But, assuming that they both give evidence to the same effect in the trial, then it is in order and conventional practice for the Expert to have summarised what they said to him, and the Jury would, if they give evidence in the trial, then have an evidential basis for the Expert's opinion. In my judgement there can be no real difference between referring to what the Defendant says and referring to what the brother says. I, therefore, do not think it right to say that the Expert may not refer to what the brother said. Having said that, I very much hope that, when adducing evidence, counsel will do it in a very brief and truncated form. The only significant aspect of the brother's information to the Professor, is that it supports and corroborates that which the Defendant told the Professor. That is really the only matter I would have thought which needs to go before the Jury. But that is a matter ultimately to be debated at the trial. 8. The second aspect to which Mr. Whelan takes exception is that the Professor, at paragraph 3 of his conclusions, asserts that it is common for people who have been involved in killings to suffer from amnesia, wholly or partially. It is said there are many such occasions recorded. On this occasion the Defendant's assertion is that he cannot recall certain parts of the evening, including the actual killing. Mr. Whelan accepts that it is perfectly in order for the Professor to refer to that which I have just said, but he should not go further, as he does, and say that in his opinion the Defendant's amnesia, or partial amnesia, is likely to be true. He says that is usurping the role of the Jury. I entirely accept that a decision as to whether the Defendant is being truthful when he says he is suffering from amnesia is entirely a matter for the Jury but, given the particular circumstances here as urged by Miss Juste, I do not think that it would be wrong to allow the Expert to proffer his opinion whilst at all times making it clear that it's just his opinion and that what counts here is the decision of the Jury. 9. Thirdly, Mr. Whelan objects to the conclusion at paragraph 12 that the use of the belt, in the course of the killing, is significant because it is likely, symbolically, to represent the beatings which the Defendant received from his father. In my judgment Miss Juste is right to say that this is part and parcel of the discussion as to why the Defendant's particular characteristics may have made him more likely to lose his self control, and it is, therefore, relevant and admissible. The weight to be given to it will, of course, be a matter for the Jury. 10. Secondly, Mr. Whelan objected in total to the admissibility of Professor Eastman's report. He submitted that there was no evidence of mental illness and, therefore, the evidence of a Psychiatrist was not relevant or admissible. What was needed here was evidence from a Psychologist and the Defence already had that. He asserted that the Professor's report was, in effect, no more than a lot of supposition, conjecture and theory. I note that in *Holley*, where the issue was again whether there were certain characteristics which would bear on provocation, including that of alcoholism, evidence from a Psychiatrist was admitted, as well as from a Psychologist, and indeed the Court of

Appeal based great weight on it and there was no suggestion that it was wrongly admitted, quite the contrary. In my judgment it is admissible. A psychiatrist's evidence is not to be limited wholly to cases where there is an identifiable mental illness. The matters referred to here are closely related to the mental condition of the Defendant, or relate to the mental condition of the Defendant, and I think it's not unreasonable that the Defence should ask for Psychiatric evidence as well as Psychological evidence. 11. As to the content of the report, it is true that both reports are very discursive and very long. This is not entirely surprising because, of course, they were written reports no doubt to try and give the Defence the full picture, but it is vital when this evidence is put before the Jury that it is put in a simple and straightforward manner. Too much detail will simply confuse and obscure. I felt that Mr. Whelan summarised in an extremely helpful way the matters to which Expert evidence in this case should be directed. He set it out as follows in relation to the Psychologist, and the same applies in relation to the Psychiatrist: That the evidence of the Psychologist should be confined to:

- (a) Identifying those characteristics in the Accused's personality which are said to be relevant to the question of loss of self control;
- (b) What the quality of those characteristics are generally;
- (c) An opinion as to the affect those characteristics may have had on the Accused's capacity for self control in the circumstances of the killing; and
- (d) Identifying the information upon which his opinions are based. Now, that is not to be taken as a Statute but it is, in my judgment, a very helpful exposition of what really the Expert evidence in this case should be directed towards and I, therefore, urge Defence Counsel, and will expect them, to adduce the evidence in a way which focuses on those matters. But, subject to that advice, I consider that the evidence of both Experts should be admitted. 12. I turn next to the other issue, which relates to a previous occasion when, it is said, that the Defendant committed the offence of malicious damage. In essence, it is said that on 12th April, 2004, he let himself into the flat in which the victim lived. He had something to drink with her. He then became angry when she received a telephone call from another man, who in fact happened to be the Defendant's brother. He expressed this anger by throwing framed photographs around the victim's lounge and, in the process, damaged her door. He was arrested and whilst at the Police Station he referred to the victim as 'a mad bitch'. At the time the Police evidence is that he was not sober enough to be interviewed, but he did admit it the next morning. The Prosecution wish to, in effect, adduce evidence of this incident by means of a statement made at the time from the deceased, which can be admitted under the Police and Criminal Evidence Law, and the direct evidence of Police officers. 13. The Prosecution also wish to adduce evidence that two months or so earlier, the Defendant had had the locks on her flat changed and she had expressed fear of the Defendant to another person. They also wish to adduce evidence that she visited the Women's Refuge after the April incident. 14. The Defence object and say, first, this evidence is not relevant and, therefore, not admissible. Secondly, even if admissible, this is highly prejudicial. The parties are agreed on

the principles; in particular, the matter is very helpfully set out by the Jersey Court of Appeal in the case of *Holley*. And I would cite from the following paragraphs. 21. As regards evidence of the background to the alleged offence, it is well established that prosecution evidence is not to be limited to the precise circumstances of the offence, where the background is relevant and ought to be placed before the jury so that the jury can see the full circumstances in the round. In cases of violence as between husband and wife or those in a close relationship as here, some of the history of the marriage or relationship is almost always relevant. Where provocation is put forward as a defence in such cases, it is the more clear that some of the history has inevitably to be placed before the jury so that they can assess the provocation on which the defence relies. 22. The relevant passages of Archbold and Blackstone and the cases cited there show that it is commonplace to put in evidence of the history as background to an alleged offence. As Purchas LJ said in the English Court of Appeal in *R v Pettman* (2 May 1985, unreported): "Where it is necessary to place before the jury evidence of part of a continual background of history relevant to the offence charged in the indictment and without the totality of which the account placed before the jury would be incomplete or incomprehensible, then the fact that the whole account involves including evidence establishing the commission of an offence with which the accused is not charged is not of itself a ground for excluding the evidence." 23. In allowing evidence of the background to the offence to be called, the Court has to be careful:

- (i) not to admit so much background evidence as to distract the jury's attention away from the central events relating to the alleged offence; (ii) not to admit, as background evidence, evidence which has limited probative effect, and the effect of which will primarily be prejudicial, to show the accused in a bad light: the prejudicial effect must not be allowed to outweigh the probative value. In *R v Butler (Diana)* [1999] Crim. L. R. 835 the English Court of Appeal indicated the utility of counsel trying to agree an account of the background so as not to distract the jury's attention from the central events by the calling of extensive oral evidence of the background. That was said on the footing that the agreed account would be in substitution for, and not in addition to, all or part of the evidence that would otherwise be called. I would also refer to *R v. Phillips* (2003) EWCA Crim. 1379, and again there is a short passage there. At paragraph 32 the Court said "We would add that we think that evidence about the state of the marriage was admissible in any event as was described in *Pitman* as part of the continual background of history. In a case where one spouse is charged with the murder of the other, it will often be relevant for the Jury to know about the matrimonial relationship in order to make a properly informed assessment of the entire evidence. In our view, this would have been a sufficient basis on its own to admit the evidence in the present case. If the Jury had not been furnished with background material about the marriage they would have been perplexed. They would have known that the Appellant used to sleep in a bed by himself in his office and used to communicate with his wife by sending her notes. They would certainly have wanted and, in our judgment, would have been entitled to know a great deal more about this marriage." As I say, Counsel agreed on the principals but they disagree on its application to this case. The Defence in particular relied on the case of *R. v.*

Dolan

(2003) 1 Cr. App. R.18. In that case the Appellant was convicted of murdering his three and a half month old son. The child died from violent shaking, and it was either the mother or the father. This occurred in March, 1999, and the Judge allowed in evidence a number of incidents going back, in some cases to 1997 and none of them very recent, where the Defendant had lost his temper with inanimate objects. So, for example, in one case he had lost his temper with a fire, as it wouldn't light and smashed it up either with a hammer or by kicking it. Another occasion the shower wouldn't work so he smashed the bath up with the shower head. The Court of Appeal held that this evidence had been wrongly admitted. The fact that a man who was not shown to have had any tendency to lose his temper and act violently towards human beings but became frustrated with and acted violently towards, inanimate objects was irrelevant; it simply went to propensity and was highly prejudicial. Miss Juste argues that that is the position here, because in this incident the Defendant threw inanimate objects about. 15. But, in my judgment, the situation here is quite different. In Dolan the incidents were nothing whatsoever to do with the relationship, either with the mother or with the child. The incidents proved nothing in relation to those matters, it was simply a case of a man becoming frustrated with an inanimate object when it wouldn't work. Furthermore, it was long before the incident. Here, what is said by the Prosecution is that this incident shows that the Defendant could become violent in the context of the relationship. The Defendant lost his temper on this occasion it is said because of a telephone call by another man to the victim. It was, indeed, evidence about the nature of their relationship. 16. Furthermore, the Defence experts both give evidence on the basis of the Defendant's version to them of his relationship with the victim. It is only fair, in my judgment, that the jury hear of the relationship in the round. The Prosecution would wish to submit that the evidence, as shown for example in this incident, does not quite accord with everything that was said by the Defendant to the Experts, and upon which the Experts based their reports. I consider that this evidence is relevant and admissible. It is necessary for the jury, when considering the issue of provocation, to have a complete and comprehensible picture of the relationship between these two individuals. It is the essential background to the jury's consideration of the issue. I think fairness requires that this aspect of the relationship should be before the jury in just the same way as other aspects of the relationship are before the jury, so they can consider all these matters when deciding the issue of provocation. 17. Having decided it is relevant, I must then consider whether the prejudicial effect outweighs the probative value but I do not consider that it does. For the reasons I have given I think it is important that the jury should be aware of it and I do not consider that the prejudicial effect will outweigh the probative value, or that it would be unfair to admit it. 18. Now, what I have said here relates to the evidence about the incident of malicious damage and the immediate aftermath in terms of his arrest and what happened at the Police Station. As to the other matters, I think it right and proper that the jury should be aware of the fact that the locks had been changed. Indeed, this appears

from the victim's statement about the incident. But I do not consider that the other matters contained in the statement of Susan Farrar and Francis Mesney should go before the jury. They relate to things the Deceased may have said to them about possibly being frightened or that she attended the Women's Refuge. I think this is all coming very indirect, this evidence, I think it is prejudicial and I do not think it is very probative. On that basis I exclude those aspects but I allow in the aspects to which I have referred. 19. I also repeat what the Court of Appeal said, namely that this evidence must go in in the least prejudicial form. In the case of Holley counsel very properly agreed a schedule and this was simply placed before the jury, and I urge counsel in this case to give consideration as to whether the necessary elements of what happened on the 12 th April should not go before the jury by way of agreed admissions, if that is possible. So, those are my decisions. Authorities Holley -v- A. G . (25 th October 2001) Jersey Unreported; [2001/210] Holley -v- A. G. [2003]JLR22. R -v- Smith (Morgan) [2000]3. W. L. R.654. Archbold (2005) Para 4-326. Turner (1975) 650 Cr. App. R. 80. R. v. Dolan (2003) 1 Cr. App. R.18 R v. Phillips (2003) EWCA Crim. 1379 Page Last Updated: 14 Jul 2016 BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII

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