

JERSEY / JUDGMENT

AG v H [2020] JRC 173A

(01 September 2020)

[2020] JRC 173A

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JUDGMENT

THE DEPUTY BAILIFF: 1. On 17 th August, 2020, the Court heard a number of applications in relation to evidence to be heard in this case which is listed for trial on 24 th August, 2020. 2. In brief summary, the Defendant is to be tried by jury on two counts of rape - vaginal rape and anal rape committed in the early hours of 14 th September 2019. It is alleged that the Defendant brought the complainant, a stranger until that night, to his hotel room and subsequent to consensual sex, the Defendant left his bedroom and returned with a knife and subjected the complainant to painful vaginal and anal sex without her consent. Immediately after the incident the complainant told the night porter that the Defendant had tried to force her to have sex but she had ran away. 3. In interview the Defendant said that he had "normal sex" with the complainant but when asked what this meant he made no comment. In his defence case statement the Defendant denies having penetrative penile sex with the complainant and describes sexual activity short of intercourse, initiated by the complainant. 4. There are four separate matters upon which the Court needed to rule, although the second, third and fourth matters are connected as they arise from material discovered on the Defendant's mobile telephone. 5. I will consider each issue in turn. The statement made by the Defendant to the Assistant Magistrate 6. Prior to the Defendant being charged with the offences, he appeared before the Assistant Magistrate on 25 th October, 2019, in order to apply to vary his pre-charge bail conditions. The hearing was tape recorded and the transcript is agreed. 7. It was agreed that the Court could proceed on the footing that the transcript was accurate. I do not propose to set out the entirety of the transcript as that would lengthen this judgment unnecessarily. 8. The prosecution advocate described the evidence against the Defendant and the Assistant Magistrate then addressed the Defendant directly who was, at that stage, unrepresented. The Assistant Magistrate said that the purpose of the hearing was to permit the Defendant to ask someone who was "independent" to consider varying his conditions of bail. He explained to the Defendant the usual grounds for imposing bail conditions. He explained that one matter that needed to be taken into account when considering the bail conditions was the nature and seriousness of the offence. He went on to say that when considering the nature and seriousness of the offence, there would need to be consideration of the strength of the evidence. He then asked the Defendant a number of questions as to why he had come to Jersey. He had come to the Island for work purposes

towards the end of August 2019. 9. The exchange at page 16 to 19 of the transcript is as follows:

"MAGISTRATE: Okay. Now, as I say, so the things I have to look at, the nature and the seriousness of the offence, the strength of evidence and your community ties. Well the community ties we've just dealt with. They're, they're fairly simple. You're here on, for work. Short-term project. Should be back in [Redacted]. Right? That's that. In terms of the nature and seriousness of the offence, well, the allegation is one of, well, both vaginal and anal rape. There's talk of a knife, having a weapon being used, not, not actually used to cause injury, but in a threatening way, which obviously makes it even more serious. So there's not really an issue about the seriousness of the allegation. I think you possibly agree with me, that that would be a, that's a serious allegation.

DEFENDANT: So there is a, there is some type of confus-- confu-- see I, I, I have not given any statement because my lawyer told me not to give any statement----

MAGISTRATE: Okay, yes----
DEFENDANT: ---- and say "No comments". MAGISTRATE: Yes, no, okay, but, as I say, I'm not trying to trick you in any way. Yes? So don't misunderstand me. I just want to understand the things I need to really focus on this afternoon. I mean, do you accept that, in principle, for a man to rape a woman, having at some stage in the process brandished a knife in a threatening way, that that is a very serious matter? DEFENDANT: Can I say----

MAGISTRATE: Well it----
DEFENDANT: Can I, can I tell, tell, share something---- MAGISTRATE: Well I wanted, do you agree that, that, I'm not asking if you did it. That's not, I'm just saying, as a matter of principle----

DEFENDANT: Yes, that is, that is of concern, that is of concern, yes---- MAGISTRATE: ----do you agree that that's a serious matter? Yes, okay. DEFENDANT: Yes, a serious---- MAGISTRATE: Well, quite clearly, so therefore the focus here is what is the strength of the evidence that that's what you did? You haven't been charged, but at this stage, and obviously enquiries are continuing, you've heard what Advocate Baglin said that during the course of the evening the lady in question was out with work colleagues, she, socialising, having fun, that you were in St Helier, possibly just socialising, that the two of you met up in St Helier, that you walked back to [Redacted], that you had consensual sex, vaginal intercourse, but that, which no complaint is made at that point, but that things turned threatening with a knife and with an anal rape. So this, and that therefore----

DEFENDANT: This is not the complete truth which they are sharing. I can, I can share everything bit by bit in a written statement also. If you want I can write up everything----

MAGISTRATE: Well---- DEFENDANT: ----every discussions, everything what has happened during that night.

MAGISTRATE: Well why don't, would you like to summarise it? So, because, take, take me through it briefly and we'll see what I need to delve into more deeply. DEFENDANT: But you want me to tell the other side of my, my story, that what actually happened, the events, events what happened? MAGISTRATE: Well the, as I say, you haven't been charged with an offence----

DEFENDANT: And what-- okay. MAGISTRATE: ----and when you were, received legal advice, one of the things you were told is that you don't have to say anything. You don't, there, there is, the rule under Jersey law is the same in English, [Redacted]. You know, a person is innocent until proven guilty and they, well certainly, in Jersey you are not obliged to answer police questions. So when you were interviewed by the police and went "No comment", that's perfectly legal. Without legal advice, what I don't want you to do is obviously, because we, you have a, the police officer present in court, DC Percival, and obviously Advocate Baglin, who is the Prosecution advocate, I do not want to put you in a position where you jeopardise your position by saying anything which

a lawyer might say "Oh don't say that". But you've heard the allegation that has been made against you. Now, first of all, is it true that you met up and went back to [Redacted] with this lady?

DEFENDANT: Because my lawyer told me not to tell any, anything in front of the police, so is it okay to reply? I, I don't, I don't know. That is why I was requesting you so that---

MAGISTRATE: Well Mr Weston is not in a position to give you advice about these things.

DEFENDANT: Because lawyers are not taking my case. I have applied for legal aid also and I went to other lawyers also. They are charging very high, I, which I cannot afford.

MAGISTRATE: Okay, well if you are charged with this offence or an offence arising like this, I would anticipate that you would be able to make an application for legal aid. I can't guarantee it, but if you, but, but you've heard what Advocate Baglin has told me, that the two of you were together, that you had consensual vaginal intercourse and there's no complaint at that stage. Doing that with consent is not an offence. It's what happened afterwards. Those are, as I say, the allegation, as I say, that you, I'm perhaps paraphrasing, that the, the atmosphere changed----

DEFENDANT: Sir----

MAGISTRATE: The----

DEFENDANT: This is wrong. This is wrong. This was not there and, and she has told, I don't know whether I can tell my side of the story here in front of police or not, but, but we, we had done anal and vaginal sex both during the first time also----

MAGISTRATE: Okay.

DEFENDANT: -- and I can, I can share with you all that it is if you want, why it happened and----

MAGISTRATE: Essentially you're saying that what happened was with her consent.

DEFENDANT: Yes, it was with her consent." 10. The Crown wish to adduce the admission to consensual vaginal and anal intercourse. Both parties are agreed that this amounts to a partial "confession" for the purposes of Article 74 of the Police Procedures and Criminal Evidence (Jersey) Law 2003 ("the PPCE Law"), having, in particular, regard to the interpretation of "confession" in Article 1 of the Law. 11. The relevant part of Article 74 provides: (1) In any proceedings a confession made by an accused person may be given in evidence against the accused in so far as it is relevant to any matter in issue in the proceedings and is not excluded by the court in pursuance of this Article. (2) If, in any proceedings where the prosecution proposes to give in evidence a confession made by an accused person, it is represented to the court that the confession was or may have been obtained - (a) by oppression of the person who made it; or (b) in consequence of anything said or done which was likely, in the circumstances existing at the time, to render unreliable any confession which might be made by the accused in consequence thereof, the court shall not allow the confession to be given in evidence against the accused except in so far as the prosecution proves to the court beyond reasonable doubt that the confession, notwithstanding that it may be true, was not obtained as aforesaid." 12. In this case the parties also agreed that the prosecution evidence was accepted and not challenged. The Defendant did not give evidence in relation to this matter, nor was he obliged to. It was agreed that even though the trial had not begun, this application could proceed as a "voir dire", with the Court's ruling binding for the purposes of the trial. 13. As to the relevant principles, the defence drew to the Court's attention the case of *Beeres -v- Crown Prosecution Service West Midlands*

- [2014] EWHC 283 (Admin) . In that case, Mr Justice Green, giving judgment in the High Court of Justice, Queen's Bench Division said the following in relation to section 76 and 78 of the Police and Criminal Evidence Act 1984 which are in common terms to Article 74 and 76 of the PPCE Law: "9. The Court has wide powers to exclude confession evidence under sections 76 and 78 PACE 1984 and under common law (as to which see e.g. per Lord Griffiths in *Scott -v- R*
- [1989] AC 1242 at 1256 (PC)). Section 76 focuses upon the reliability of a confession by virtue of the facts leading up to its making. It has a particular structure to it involving a series of pre-conditions and changes to the burden and standard of proof. However, irrespective of whether the conditions in the section are met, a Court will also examine the facts to see whether admission of a confession is "fair" under section 78 PACE and common law...
10. Section 76 PACE has been considered upon many occasions by the Courts. It set out below a summary of the principal points of law of particular relevant to the present case:
- (i) ... (ii) Under section 76 of the reliability of a confession to be challenged all that is required is a "representation" to the Court that the confession meets the conditions in section 76(2) (b). According to the editors of Archbold (2013) at paragraph 15-331: "A statement by responsible counsel, upon the basis of documents or a proof of evidence in his possession at the time of speaking, that a confession was or may have been obtained by oppression or in consequence of anything said or done which, in the circumstances at the time, was likely to render it unreliable is a "representation" for the purposes of section 76(2); the comment by Russell LJ in *R -v- Liverpool Juvenile Court ex p R* [1988] QB 1, 86 Cr. App. R. 1 CA, to the effect that "representation" is not the same as and does not include cross-examination was not followed by any consideration of what it did include: and where such a representation was made, the Judge of his own motion (see s.76(3)) should have required the prosecution to prove it in a voir dire that the confession was not so obtained, even though neither counsel had asked for a voir dire: *R -v-Dhorajiwala*
- [2010] 2 Cr App R 21 CA." No issue in the present cases arises as to the adequacy of the "representation" because the Judge treated the representation made as valid and thereafter conducted a voir dire. It seems to me that Parliament did not intend to impose a high burden upon a Defendant seeking to challenge a confession. Provided the representation is not mere assertion and is based upon some credible, more than insignificant or trifling, evidence then the rebuttable presumption against admission of the confession evidence is triggered, i.e. the confession is inadmissible unless the prosecution establishes beyond reasonable doubt that the confession has not been obtained in a way that contravenes section 76. This conclusion is justified by: (a) the importance of the rights of the detainee being protected; and (b) the deliberate and relatively low key use of the word "representation" in Section 76. (iii) The representation need not demonstrate that the confession "was" unreliable; all that need be advanced is that the confession "may have been" unreliable. Section 76 is concerned to protect against a risk of unreliability. (iv) It follows from (iii) above that the test for the Court is not whether the confession was

reliable per se. The Court is concerned not with the intrinsic quality of the confession as evidence but with the manner in which it came into being and as to the risk of it being unreliable. This is evident from section 76(2) which states that a confession may be excluded "notwithstanding that it may be true". (v) The focus on the analysis is the position that pertained at the time of the impugned confession; cf "in the circumstances existing at the time" in section 76. The Court therefore cannot examine the confession in the light of other evidence which might arise in the course of the trial insofar as that evidence does not bear upon the conditions prevailing at the time: See in this regard the criticism by the Divisional Court of a judge who having heard an application at an early point gave reasons much later, after all the evidence was heard, and sought to justify his decision upon the basis of evidence arising in the trial which could not have influenced the decision he had taken earlier: *R -v- Gill et ors*

[2004] EWCA Crim 3245 at paragraphs [68] - [71]. (vi) The words in section 76(2)(b) "anything said or done" include acts and omissions i.e. failures to do something: *Gill* (ibid) paragraph [68(2)]. The distinction between acts and omissions will in any event frequently be artificial. For example, an officer who inadequately advises a detainee of his or her rights may well be acting culpably because his actions (the commissions) simply did not go far enough (the omission). Indeed, that is the gist of the complaint about legal advice in the present case. In such a case the reliability of the confession is in issue because the "anything said or done" was an incomplete or partial statement or action. (vii) Culpability on the part of the police is not a sine qua non to exclusion of a confession: e.g. *Gill* paragraphs [61], [68(3)]. For example, as in *Gill*, the police might not at the point in time of the interview actually know that a detainee suffers from some form of mental incapacity. The absence of culpability on the part of the police is not determinative since a confession may prove to be unreliable notwithstanding. Evidence as to unreliability might emerge later (for instance subsequent medical evidence as to incapacity) but it will be relevant evidence because it pertains to the circumstances prevailing at the time of the confession. (viii) The assessment under section 76 PACE will take into account whether there has been adherence to the Codes to PACE. A failure to adhere to a requirement in PACE is not mere "rigmarole". In *R v Charles*

[2009] EWHC 3521 paragraph [10] (Admin) the Court stated: "These provisions are not a mere rigmarole to be recited like a mantra and then ignored. The provisions of the Police and Criminal Evidence Act and the Code relating to caution, are designed to protect a detainee. They are important protections. They impose significant disciplines upon the police as to how they are to behave. If they can secure a serious conviction in breach of those provisions that is an important matter which undermines the protection of a detainee in the police station". (ix) However, not every breach of PACE or the Code will lead to the exclusion of the evidence in consequence thereof: *R v Charles* (ibid) paragraph [10]; *Gill* (ibid) paragraph [72]. If there has been a breach the Court will consider whether it was a material breach i.e. whether had the breach not occurred it would have made a difference: *Gill* (ibid) paragraph [73] and [68(4)]. (x) Finally, the position under section 78

PACE 1984 which concerns fairness will not normally differ from that based upon the application to the same facts of section 76 PACE." 14. I accepted these principles as applicable as a matter of Jersey law, as well as under the law of England and Wales. 15. I also accepted defence counsel's assertion that his reasoned challenge to the admissibility of the confession meant that the Crown was required to prove beyond reasonable doubt that the confession was not obtained in a way which contravened Article 74. 16. A number of criticisms were made of the procedure adopted by the Assistant Magistrate. 17. It was said that it was not necessary for the Assistant Magistrate to ask the Defendant to agree that the allegation was serious; it was not necessary for him to be asked to give his own account; if he was to be asked any questions at all then he should have been told that anything that he said could be used against him if he was charged with an offence; the Assistant Magistrate said that he was independent and then in effect acted as an interviewing officer; the Assistant Magistrate should not have questioned the Defendant about the facts at all and, even if he had, he should have cautioned the Defendant first. 18. The Crown in response said that the Assistant Magistrate took exceptional care to say that the Defendant should not say anything contrary to his interests and that is reflected by the Assistant Magistrate saying that he was not trying to trick the Defendant in any way and that he did not want to jeopardise the Defendant's position. The Crown say the Assistant Magistrate proceeded with scrupulous fairness. 19. I agree with the defence that it would have been better had the Magistrate not attempted to secure from an unrepresented defendant any account directly relevant to the commission of the offence. That is a matter which the Court should best have steered away from, particularly in a pre-charge hearing in relation to an allegation as serious as this. Further, if the Court had thought it necessary to ask the Defendant directly about circumstances relevant to his guilt or innocence, then he should have been cautioned - it was not enough for the Assistant Magistrate to say that he would have received legal advice to the effect that he did not have to say anything in his police interview. He should also have been told that he did not have to answer the questions being put to him by the Court. 20. However, standing back and looking at what was said by the Magistrate I am satisfied beyond reasonable doubt that the words which the Crown wished to adduce were not obtained either by oppression (which is not alleged) or in consequence of anything said or done which was likely in the circumstances existing at the time to render unreliable any confession which might have been made by the Defendant in consequence thereof. Although the hearing may have been conducted differently, the Assistant Magistrate at no time suggested that any particular account that the Defendant might advance would assist him in his application for bail, or indeed made any other remarks which might have rendered the account which the Defendant gave unreliable. Accordingly, this evidence is admitted although in due course I will direct the jury carefully about its status and relevance. 21. As to my discretion to exclude evidence under Article 76 of PPCE I decided that the admission of the evidence would not so adversely affect the fairness of the proceedings that the Court ought not to admit it. The defence have indicated that they are to make points regarding the alleged inconsistency between the accounts given by the complainant. This is simply a case of the Defendant

advancing a particular defence which may or may not be consistent with the defence case statement and police interview. The Defendant appears to advance a different defence from that mentioned to the Assistant Magistrate. The jury is entitled to know about this in my judgment. I do not think that the consideration of my customary law discretion to exclude evidence adds anything, in the circumstances of this case, to the discretion under Article 76 of PPCE. The second and third matters 22. The next two pieces of evidence can be taken together. They arise from an examination of the Defendant's mobile telephone. This was seized on the Defendant's arrest and examined by Josh White, a digital investigator employed by the States of Jersey Police High Tech Crime Unit on 21 st and 22 nd January, 2020. On the latter date he produced a DVD which apparently, when printed out, runs to some 10,500 pages. 23. At the plea and directions hearing on 14 th May, 2020, the Crown did not notify the Court of any outstanding evidence and the Crown was required to disclose any further evidence by 12 th June, 2020. This they failed to do, owing to a misunderstanding within the police which resulted in the officer in the case not becoming aware of the telephone evidence until it was disclosed to him recently. It was disclosed to the defence on 13 th July, 2020. Prior to that date this evidence had not been referred to by the Crown in any correspondence and did not appear in the unused material schedule dated th March, 2020, or an updated schedule dated 15 th June, 2020. 24. The second piece of evidence which the Crown sought to adduce was a "WhatsApp" conversation between the Defendant and an unknown female commencing at 3:29am on 8 th September, 2019. 25. A third piece of evidence related to a message sent at 2:57am on 8 th September, 2019 to a female called "J" and a subsequent search for that woman on a dating application called " Plenty More Fish ". This was an application that the Defendant downloaded in Jersey. It is said in relation to that material that the WhatsApp conversation and the communications sent to J show the Defendant, a man who is married with children, attempting to commence sexual relationships with females in Jersey. It is said in one of the conversations the Defendant misleads his correspondent as to his marital status, which the Crown says is something he expressly or impliedly repeated in his dealings with the complainant. It is said that these are relevant matters and should be adduced by way of admissible background evidence. 26. The test for admission of such evidence was considered by Sir Michael Birt, Commissioner, in AG -v- Christopher Roy Bacon

[2016] JRC 181 . In that case Commissioner Birt said: "79. Crown Advocate Yates submits that the evidence as to what happened in Guernsey is necessary by way of essential background evidence. The principles governing the admissibility of such evidence are well established. In R v Pettman 2nd May 1985, Purchas LJ in the English Court of Appeal said this:- "Where it is necessary to place before the jury evidence of part of a continual background or history relevant to the offence charged in the indictment, and without the totality of which the account placed before the jury would be incomplete, 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."

80. The law in Jersey is to like effect. Thus the headnote to the decision in *Glover v AG*

[2008] JLR N 30 reads:- "As a general rule, the Crown was obliged to call all relevant evidence to support its case, including background evidence of any kind (e.g. evidence establishing the commission of a further criminal offence with which the accused was not charged) if the absence of such evidence would result in a deficient or distorted picture being presented to the Court (*R v Pettman* ... applied). The court had discretion to exclude such evidence notwithstanding its admissibility, if its prejudicial effect outweighed its probative value (*R v Fulcher* ... applied)."

81. The Court of Appeal repeated this approach in *U v AG*

[2012] (1) JLR 349 and at para 41 specifically approved this extract from an article by Professor Birch in *Commentary on R v Stevens* ([1995] *Criminal Law Review* at 651) where, in distinguishing between similar fact evidence and background evidence, she said this in relation to background evidence:- "... background evidence, on the other hand, has a far less dramatic but no less important claim to be received. It is admitted in order to put the jury in the general picture about the characters involved in the action and the run-up to the alleged offence. It may or may not involve prior offences; if it does so this is because the account would be, as Purchas LJ says [in *R v Pettman*] 'incomplete or incoherent' without them. It is not so much that it would be an affront to common sense to exclude the evidence, rather that it is helpful to have it and difficult for the jury to do their job if events are viewed in total isolation from their history." 27. I do not regard the Defendant's contact with these two women, and the downloading of the dating website as sufficiently relevant to be admitted as background evidence. 28. The communications with the persons in question were relatively anodyne and insufficiently relevant to this allegation of rape to be considered by the jury. The fourth matter: the Defendant viewing pornographic material on the internet 29. The allegation in the draft agreed facts in relation to the Defendant accessing pornography is that between 24 th August and 10 th September, 2019, the Defendant accessed material of an adult nature which, although lawful, is relevant to the commission of the alleged offence because the material, inter alia , included items on the "x videos" website with titles such as "painful first time anal sex ends with a facial" ; "painful interracial anal sex"; "I accidentally arse fucked you" and searches for "sex with fat women ". 30. The Crown says that this material is directly relevant to the complaint and the defence; the defence says that the complainant was the sexual aggressor with the Defendant repeatedly asking her to stop. The defence case is that the Defendant was not interested in sexual intercourse with the complainant and was effectively forced into sexual acts against his will. 31. The Crown say that the phone download material shows that the Defendant searched for adult pornography websites which involve content reflecting his sexual interests including causing pain during anal intercourse. Further, his search history shows that at 4:42am on 14 th September, 2019, shortly after the complainant left his room complaining of rape, the Defendant searched for pornographic

material on his phone. 32. It appears to the Court that the Crown was, in this application, attempting to adduce the Defendant's bad character and that accordingly this was a matter which ought to have been the subject of an application under the PPCE Law, as amended by the Criminal Procedure (Jersey) Law 2018 . Bad character is evidence of, or of a disposition towards "misconduct" pursuant to Article 82C of the 2003 Law, and "misconduct" means "the commission of an offence or other reprehensible behaviour". 33. Both counsel were agreed, although I have some doubts as to whether or not they were right to make this agreement, that searching for this pornographic material, although admittedly lawful did not amount to "other reprehensible behaviour". 34. Plainly, if this evidence did amount to character evidence for the purposes of the PPCE Law then the principles in relation to the admission of background evidence as established by pre-existing case law are irrelevant, as pursuant to Article 82D of the PPCE Law, any rules of customary law governing the admissibility of evidence of bad character are abolished. It is only when the bad character provisions in the PPCE Law do not apply that the customary law remains relevant. 35. Although I did not hear argument to this effect, it seemed to me that there was a good argument that at least some of the pornographic material identified was relevant to a matter in issue between the Defendant and the prosecution and potentially admissible pursuant to Article 82F of the PPCE Law. 36. One difficulty with the prosecution's evidence in relation to the pornographic material was that because of the late service of the same there had been insufficient time to properly consider whether or not the draft admissions were wholly accurate. When the Crown referred, for example, to the Defendant accessing material of an adult nature as it was clear from questions posed by the Court that it was uncertain as to the extent to which the defendant put in search terms which led to the material identified from his mobile telephone being produced or whether such material was simply thrown up by other searches for other material of a pornographic nature. 37. In that regard we were assisted by Mr White who gave evidence which supplemented the statement he made in January 2020. He identified a number of search terms that the Defendant would have typed himself into the "X videos" website. There were many searches for, for example, "defloration". The only searches relating to anal sex were two searches under the title "Oops wrong hole". The vast majority of pornographic material apparently viewed by the Defendant did not relate to forced or violent anal or other sex. 38. Mr White explained that a search term would generate a page listing many different videos or images. He said that the list of material he had produced had been stored on the web history of the Defendant's mobile telephone. This is an automatic process which occurs when a person searches on the internet. He said that the specialised software available to the police can recover deleted history but the small sample of pornographic material downloaded from the Defendant's mobile telephone shown to us indicated that there had been no attempt to delete that material. He said that each title, for example the video or image entitled "painful interracial anal sex" had to have been clicked on in order to appear on the Defendant's search history. 39. He was cross-examined and confirmed that in order for the detail of a page to be stored on the mobile telephone there would have to have been user activity at that time on that page and

that would not be generated by, for example, someone closing a page that they had opened on another occasion. 40. It was clear that there were some duplicated material listed on the schedule produced from the Defendant's mobile telephone history. 41. The defence argued, in relation to this material, that even if the Crown could establish that the Defendant accessed and viewed the material, it does not establish that it is more probable than not that the Defendant penetrated the complainant's vagina/anus without her consent. Further, even if the evidence is relevant, it ought to be excluded under Article 76 as its probative value is outweighed by the prejudicial effect that it may have. The point was made, which the Court accepted, that in order for the Defendant to demonstrate that only a very small part of the material viewed by him bore any similarity to the allegation made against him, he would need to reveal to the jury the entirety of his search and viewing history, amounting to in excess of 2,000 items, which the jury might find distasteful and that this would be unfairly prejudicial. Advocate Blakeley drew a distinction between material that was prejudicial because it was probative and material that was prejudicial for other reasons. Most of the material in this case would fall into the latter category. The Crown pointed to the fact that when it was put to the Defendant in interview that he had said that he was not attracted to anyone because he was a married man with a wife and two children, he accepted that proposition. Certainly, if he were in evidence to deny that he was interested in painful anal intercourse with a woman who was not his wife, then this evidence would, on the face of it, be relevant. Accordingly, the admissibility of this evidence is a matter that I will keep under review during the course of the trial. 42. The only searches that were carried out before the day of the offence which relate directly to the commission of the offences are the two searches for material related to for anal sex to which I have referred and the material they produced. Both are, in my view, relevant and admissible, subject to my discretion to exclude that material under Article 76. 43. On balance, I have been persuaded that it is appropriate to exclude that evidence under Article 76 as in the context of the Defendant's search history overall (insofar as it has been made available to me) the probative value of this evidence would be outweighed by its prejudicial effect. However, this is a matter that I will keep under review in the course of the trial as, depending upon the way in which the Defendant puts his case, particularly if he gives evidence, it may become more relevant. 44. For example, if this is to be regarded as character evidence under the PPCE Law then the Defendant's interest in material relating to anal sex would prima facie be admissible under Article 82I of the PPCE Law in order to correct a false impression if the Defendant were to say in evidence that he had absolutely no interest in anal sex. 45. As to the Defendant's search for pornographic material after 4:30am on the day of the alleged offence, this is not background material as it relates to the events of the day in question and immediately follows the alleged offence. The Crown says that at 4:42am on 14 th September, 2019 "moments after returning to his room having unsuccessfully searched for the complainant, the Defendant searched for pornographic material on his phone." 46. However, the Defendant's search for this material was, as Mr White accepted, limited to less than one minute and any individual video or image was viewed for no more than a few

seconds. In the circumstances I have concluded that this material is, on the evidence as I currently perceive it to be, of insufficient relevance to be admitted. 47. In the course of argument the defence indicated that they would seek an adjournment in order to have an expert examine the material produced by the download if any of the material was admitted. 48. It was clear from the schedule produced by Advocate Blakeley and his cross-examination of Mr White that he had been able analyse the material to a significant extent already. It was only a very small part of the material in question that the Crown wished to adduce and an even smaller part of that which the Court would have permitted the Crown to adduce. 49. My view was that Advocate Blakeley, by way of cross-examination of Mr White and/or examination of the Defendant, if he chose to give evidence, would be able to comment on such material or place it in context in such a way as he thought appropriate and accordingly if I had decided to admit such material or indeed circumstances arise such that I need to revisit my decisions in this regard during the course of the trial, then I would be unlikely to adjourn the matter, still less discharge the jury, for the purpose of the defence seeking expert evidence. Authorities Police Procedures and Criminal Evidence (Jersey) Law 2003. Beeres -v- Crown Prosecution Service West Midlands

[2014] EWHC 283 (Admin) AG -v- Christopher Roy Bacon

[2016] JRC 181 Criminal Procedure (Jersey) Law 2018 Page Last Updated: 14 Oct 2020 BAILII:
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