

JERSEY / JUDGMENT

AG -v- Humble [2018]

JRC 086 (14 May 2018)

[2018] JRC 086

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JUDGMENT

THE DEPUTY BAILIFF: 1. On the 9 th March 2018 I handed down a judgment (AG-v-Humble

[2018] JRC 056B) in which I granted an application made by the defendant to exclude an achieving best evidence (ABE) interview conducted with one of the Complainants in the prosecution against him. 2. I will not repeat the brief background that I set out in that judgment. For a number of reasons set out therein, I held that it was in the interests of justice, ensuring the defendant had a fair trial, that the ABE interview of Complainant A (one of the two Complainants in that case) be excluded. 3. Subsequently, the Prosecution applied to admit a Statement made by Complainant A dated 25 th October 2013 ("the 2013 Statement"). On 6 th April I informed counsel that I was refusing the Prosecution's application to adduce the 2013 Statement following which, after consideration, the prosecution against the defendant was discontinued. These, in brief, are my reasons for that refusal. 4. The defendant is charged with three counts of rape against two separate Complainants. Counts 1 and 2 concern Complainant A and count 3 Complainant B. All three offences are alleged to have taken place in the period between December 1976 and June 1977. Both of the Complainants are vulnerable adults and were in residential accommodation where their needs were catered for. The defendant was in a position of authority within that institution. It is clear that in addition to the challenges that Complainant A faces generally, her ability to give oral evidence (which was at all times not without challenges) has deteriorated very substantially since the time that she gave her excluded ABE interview in 2013. At that time it was anticipated that she would give her evidence in chief by way of her ABE interview and thereafter would be cross-examined over video-link. 5. That cross-examination was to have been carefully managed. Complainant A had been the subject of a number of reports from an intermediary, Mrs Moira Pook, who in her report of 13 th September, 2016, set out the following:- "[A] tends to agree with the questioner as a first response if the questioner is assertive, the questions complex or when asked a leading question." 6. In her first report Mrs Pook also made the following specific recommendations:- "Don't ask tag question or leading questions. A tag question is not in fact a question. It is a Statement which has a short question inviting corroboration of its truth i.e. you stayed at home that day, didn't you? It is powerfully

suggestive linguistically complex form of speech and responses may be ambiguous.... typically for a person with a learning difficulty. [A] has demonstrated difficulties with complex questions and a certain compliance which would make tag questions particularly challenging." 7. Mrs Pook then met again with Complainant A and as a consequence prepared an addendum to her report dated the 27 th February, 2018. In this she said:- "1.3 Since writing that report I have met with [A] on two more occasions in connection with this case; on the 20 th October 2017, when I assisted with communication between her and Court staff during a further pre-trial familiarisation visit and on the nd February 2018 when I assisted Dr Tracy King, psychologist, with communication during her psychological assessment of [A]. 1.4 During these last two visits I noticed significant changes to [A]'s communication abilities which, I feel, will have a significant impact on her abilities to communicate her evidence. I had been asked to report these observations to the Court." 8. With regard to the meeting involving Dr Tracy King, Mrs Pook observes:- "...on this occasion it was evident that the clarity of [A]'s speech has deteriorated further. It was extremely difficult to understand her speech for the majority of the time and repetitions of her responses no longer added clarity as they had done in October 2017. 2.3 She does, however, continue to use hand gestures (pointing, showing, miming) effectively to get a simple message across and to respond to questions and her understanding of spoken language has remained consistent since my first assessment in June 2016, but without these non-verbal abilities it is almost impossible to understand what she is struggling to say." 9. In her recommendations in the addendum report Mrs Pook says as follows:- "3.1 I reiterate my recommendation that [A]'s ABE interview be played as her evidence-in-chief. 3.2 I further recommend that any questions, which are to be put to [A] during cross-examination, should be phrased in such a way as to require a yes / no response only. Whilst my assessment has indicated that she continues to understand questions requiring more complex responses, she will be unable to articulate such responses in a way which will be understood by the Court." 10. It is accordingly apparent that:- (i) Complainant A is not able to give evidence-in-chief in the normal way even with the use of a video link; (ii) Complainant A now has profound difficulties in communicating and dealing with questions other than in the most simple form. There will be substantial difficulty with the formulation of such questions and Complainant A's response will be limited to, at best, a nod for yes, a headshake to indicate no, or a gesture with the hands that indicates that she does not know. It is in that context that the Prosecution seeks to adduce the 2013 Statement. 11. The 2013 Statement was made pursuant to the provisions of Article 9 of the Criminal Justice (Evidence and Procedure) (Jersey) Law 1998 which, so far as is relevant, is in the following terms:- "Admissibility of written Statements as evidence (1) Where the conditions in this Article are satisfied, a written Statement by any person is admissible as evidence in any criminal proceedings to the same extent as if it were oral evidence to that effect by that person. (2) In every case - (a) the Statement shall purport to be signed by the person who has made it; (b) the Statement shall contain a declaration by that person to the effect that it is true to the best of the person's knowledge and belief and that the person made the Statement knowing that, if it were tendered in

evidence, the person would be liable to Prosecution if the person wilfully stated in it anything which the person knew to be false or did not believe to be true; (c) before the Statement is tendered in evidence, a copy shall be served, by or on behalf of the party proposing to tender it, on each of the other parties in the proceedings; and (d) none of the other parties or his or her advocate, within 7 days after being served with a copy, shall have served on the party proposing to tender the Statement a notice in writing that the other party objects.

- (3) ... (4) ... (5) ... (6) Notwithstanding paragraph (1), the conditions in paragraph (2)(c) and (d) shall not apply if each party agrees before or during the hearing that the Statement may be tendered in evidence." 12. I was not informed whether or not notice had been formally given in accordance with the provisions of Article 9 but it is clear that the defence objects to the admission of that Statement and accordingly prima facie it is inadmissible unless another route exists to admit it. 13. I have had the benefit of seeing a video recording of a discussion between Complainant A and police officers on the 25 th October, 2013 concerning the contents of her 2013 Statement leading to its signature. In it, on my assessment, Complainant A appeared to agree with the contents of that Statement when they were read out to her. She nodded and said things like 'yeah'. Similarly there were one or two instances in a relatively lengthy conversation that indicated that at that time she was able to assert positive

facts.

I could not say with confidence, however, that Complainant A's apparent agreement with some of the detail of the 2013 Statement was real agreement and not simply acquiescence and I noted no example of her correcting anything read out to her. 14. I have also had the benefit of seeing the recording of an attempted ABE interview with Complainant A undertaken on the 15 th March, 2018. The difficulties set out in the addendum report of Mrs Pook were all too apparent. 15. I note that there is some possible tension between the manner in which Mrs Pook originally suggested that questions would need to be put in cross-examination and the fact that she suggests that Complainant A is acquiescent in her answers. This adds to my mind a further layer of complexity to the situation. 16. The Prosecution's application to admit the 2013 Statement is made pursuant to Article 64 of the Police Procedures and Criminal Evidence (Jersey) Law 2003 (PPCEL) which is in the following terms:- "64. First hand hearsay (1) Subject to paragraph 4 a Statement made by a person in a document shall be admissible in criminal proceedings as evidence of any fact of which direct oral evidence by the person would be admissible if - (a) the requirements of one of the sub-paragraphs at paragraph (2) are satisfied; or (b) the requirements of paragraphs (3) are satisfied. (2) The requirements mentioned in paragraph (1)(a) are - (a) that the person who made the Statement is dead or, by reason of the persons' bodily or mental condition, unfit to attend as a witness; (b) the person who made the Statement is outside Jersey and it is not reasonably practicable to secure the persons' attendance; or (c) that all reasonable steps have been taken to find the person who made the Statement but that person cannot be found." 17. Article 66 PPCEL states:- "66. Guiding principles to be followed (1) If, having regard to all the circumstances, a

court, in any proceedings, is of the opinion that in the interests of justice a Statement which is admissible by virtue of Article 64 or 65 nevertheless ought not to be admitted, it may direct that the Statement shall not be admitted. (2) Without prejudice to the generality of paragraph (1), the court shall have regard - (a) to the nature and source of the document containing the Statement and to whether or not, having regard to its nature and source and to any other circumstances that appear to the court to be relevant, it is likely that the document is authentic; (b) to the extent to which the Statement appears to supply evidence which would otherwise not be readily available; (c) to the relevance of the evidence that it appears to supply to any issue which is likely to have to be determined in the proceedings; and (d) to any risk, having regard in particular to whether it is likely to be possible to controvert the Statement if the person making it does not attend to give oral evidence in the proceedings, that its admission or exclusion will result in unfairness to the accused." 18. And, lastly Article 67 PPCEL says:- "67. Statements in documents that appear to have been prepared for the purposes of criminal proceedings or investigations. (1) Where a Statement is admissible in criminal proceedings by virtue of Article 64 or 65 appears to the court to have been prepared otherwise and in accordance with Article 4 of the Criminal Justice (International Cooperation) (Jersey) Law 2001, for the purposes of pending or contemplative criminal proceedings or of a criminal investigation, the Statement shall not be given in evidence in any criminal proceedings without the leave of the court, and the court shall not give leave unless it is of the opinion that the Statement ought to be admitted in the interests of justice. (2) In considering whether its submission will be in the interests of justice, the court shall have regard to - (a) the contents of the Statement (b) any risk, having regard in particular to whether it is likely to be possible to controvert the Statement if the person making it does not attend to give oral evidence in the proceedings, that its admission or exclusion will result in unfairness to the accused; and (c) any other circumstance that appear to the court to be relevant." 19. The Prosecution submit that the 2013 Statement clearly falls within Article 64 and, specifically, that the condition to 2(a) applies in that Complainant A is a person who "by reason of the persons' bodily or mental condition, is unfit to attend as a witness". It is argued that the phrase 'witness' should be construed as 'a witness capable of being examined and cross-examined in the conventional manner'. 20. In considering this submission it seems to be relevant to note that the Prosecution are suggesting not only that the 2013 Statement be admitted in evidence but that Complainant A attends to give evidence as a witness by video link albeit under the restrictions indicated by Mrs Pook's reports. It is not clear that the statutory wording applies. It is clear that the Prosecution are not suggesting that Complainant A is unfit to attend court as a witness. They say, rather, that she is unfit to attending court as a witness in some ways but not in others. 21. Article 64 et seq of the PPCEL seem to me to be designed to admit hearsay statements in circumstances where the witness is not available to give evidence at all. It is not generally intended for the purposes of admitting a statement of a witness who might be proffered for cross-examination, albeit in very limited ways. The 2013 Statement 22. As I have foreshadowed above, the contents and reliability of the 2013 Statement itself is not without concerns. 23. The Statement is written in a style of English which seemed to me to be likely to be beyond Complainant A at the time it was made. This suggests to me that she may well have acquiesced when the Statement was put to her in some parts. 24. It contains the normal declaration in the

following terms:- "This Statement consisting of four pages each signed by me as true to the best of my knowledge and belief and I make it knowing that, if it is tendered in evidence, I shall be liable to Prosecution if I have wilfully stated in it anything which I know to be false or do not believe to be true." 25. During the course of putting her Statement to her this declaration was read out to Complainant A who merely said something along the lines of 'right okay' in response. There appeared to me to be no other conversation relating to that declaration nor was it explained in simple terms and I would find it difficult to be satisfied in my mind that Complainant A understood it. 26. There are other difficulties with the 2013 Statement. For example, as the defence says in its skeleton argument, at 31 minutes 32 seconds Complainant A disclosed that she had assisted the police with a previous investigation 'a long time ago'. Mr Sharp informed me that the Prosecution had confirmed to them by email that there is no record held by the police of Complainant A being involved in any previous investigation. 27. Mr Thomas put before me two authorities intended to support the admissibility of the 2013 Statement. 28. The first of these was *Regina v D* [2003] QB 90 in which a challenge was made to a judge's decision to admit a video recording of a witnesses' testimony where that witness was suffering from Alzheimer's disease and would not be able to give evidence. At paragraph 39 of the judgment the court said this:- "...but not only do we think there is no basis for interfering with the judges' view that it was in the interests of justice that this video should be admitted, but we entirely support his view. It seems to us that first, B was understanding the questions which were being put to her and was able to give answers to questions which could be understood. Second, B prima facie has a right to have her complaint placed before a jury and a right to have a jury assess whether they are sure the complaint is established, and the putting of the video before the jury is the only way in which that right can be upheld. Third, the defendant also has his rights but they are in this instant protected. He will be able to call medical evidence to challenge the capacity of B to remember, understand and say what happened. In reality, as it seems to us, he will be in a stronger position before a jury than he would have been if B had been called to give evidence and were to be cross-examined; we say that because the defendant through his lawyers and experts will be able to argue about the reliability of B and will further be able to make the point that they have been unable to cross-examine her.... Furthermore the circumstances of the case are such as to make it in the interests of justice both for him and B that this video should be admitted. It will and should be for a jury and a jury alone to decide with the aid of expert evidence the truthfulness or accuracy of what B was saying." 29. The second, the case of *Regina v Sed*

[2004] 1 WLR 3218 also concerned a video recording of a woman who suffered from dementia and could not give evidence. This was admitted in evidence. I do not think that these authorities are helpful relating as they do to video recordings (where a Jury would at least assess the Complainant's demeanour) as concerning as they did cases in which there was other forensic evidence linking the defendant to the alleged crime. 30. If I am wrong in the view that I have expressed above that Article 64 does not really cover the circumstances of this application, then I should go on and consider, assuming if I can admit the 2013 Statement, whether it would be in the interests of justice to do so. 31. The Crown placed before me other cases relating to the admissibility of hearsay evidence but

in each of those examples it seems to me that the decision taken by the court was in the context of a case in which the evidence against the accused extended beyond the statement which was the subject of the application. In this case it is very different. The 2013 Statement is the only evidence against the defendant that the offence alleged was committed. Understandably, there is no forensic evidence. 32. I conclude that even were the 2013 Statement admissible under the provisions of Article 64 PPCEL I should nonetheless in the interests of justice exclude it. My reasons are as follows:- (i) The Statement is the only evidence against the defendant that the crime of which he is accused has been committed; (ii) Having reviewed the Statement itself and seen a large part of the interview with Complainant A in which the Statement was read through to her, I am not satisfied that Complainant A was not, in confirming the contents of her Statement during that interview, merely acquiescing at some points. It is not clear to me that she would have followed all that was read out to her and equally I do not think it likely that she would have understood the declaration (or penal notice) contained with the Statement. This is not a matter for the Jury as they will not see the interview - merely the 2013 Statement - were I to admit it. (iii) The defence would in my view face significant difficulties in challenging the 2013 Statement. The cross-examination would be limited in the extreme and it would require a very careful intervention by the intermediary in my view to come close to the jury being satisfied that it understood the answers that Complainant A was intending to give to questions put in cross-examination. In my view it is unlikely that cross-examination could have been effective in this case. (iv) Although the defence would have been in a position, perhaps, to challenge Complainant A's Statement on the grounds of her mental condition and the fact that they have not had the opportunity to cross-examine effectively, their inability to explore any of the contested areas, and there were a number, must, in the light of the terms of the 2013 Statement, be highly prejudicial. For those reasons I do not think that the defendant could receive a fair trial and I do not, therefore, think that it is in the interests of justice to admit the 2013 Statement. 33. There is, in addition, a context which is of concern to me. 34. The defence put before me the case of *Regina v Radak*

[1999] 1 Cr App R 187 in which the Court of Appeal of England and Wales dealt with a case in which a judge himself had to consider as a matter of the exercise of a discretion whether it would be in the interests of justice to grant leave to the Prosecution to admit in evidence the written Statement of a witness living abroad who refused to attend court to give that evidence in person. At page 18 of the judgment the court said this:- "This brief summary shows that the Prosecution knew from the outset that Mr Shifrin might not attend voluntarily. His failure to respond to letters gave no course for optimism that he would, yet the Prosecution did nothing. Time passed. The trial date was set and was approaching. The Prosecution wasted a vital month between May 5 and June 5 1998 when they did nothing to grapple with the situation when they knew that Mr Shifrin was not going to attend. By inactivity they let slip the opportunity of obtaining cross-examined evidence on commission in time for the date fix for the trial. In our view, the Prosecution were, as the

judge found, culpable in these respects and the reality was that they were seeking leave to cover their culpability by a means which, as we have held, would impose a significant unfairness on the defendants. In these circumstances, we do not consider on balance that Mr Shifrin's first Statement ought to be admitted in the interests of justice. This means that Section 26 of the 1998 precludes it from being given in evidence." 35. The fact is, in this case, that an ABE interview was conducted with Complainant A. That interview was, as I have previously ruled, fundamentally flawed and I therefore excluded it. The flaws in that interview were not a matter of fine judicial judgment. Quite simply one of the cameras had not worked and the Complainant's face was not visible. There must, accordingly, have been at the very least a significant expectation that the use of the ABE interview would be met with resistance and may not be possible. 36. Furthermore, I have heard no satisfactory explanation as to why there has been such a delay between the making of the original ABE interview in 2013 or indeed the 2013 statement and bringing this matter to trial. It is in recent months that Complainant A's ability to communicate has markedly deteriorated. 37. It has been explained to me that the view had been taken by prosecuting counsel who had the conduct of this case before Mr Thomas took over that the ABE interview would be inadmissible as a matter of law (although not because of the inherent flaws in it) and hence there was no reason to record another. That, it would seem, was an error of law which led to the failure to record a second ABE interview in good time. 38. It was suggested to me in argument that there was some reluctance in producing a second ABE interview because it may in some manner have been inconsistent with the first. That was not accepted by the Crown but, if that was indeed part of the motivation, then that does not strike me as appropriate. 39. It seems to me that the flaw with the ABE interview, and the significant delay, have driven the Prosecution to seek to bring in a Statement on which it was never intended to rely. 40. The result is that, were the 2013 Statement to have been admitted, the defendant would have had significant difficulty in cross-examination and thus mounting a thorough defence. He was in no way responsible for the flawed ABE interview or for the delay. To admit the 2013 Statement would have been an injustice to him and for that reason as well I do not think it right to do so. 41. I acknowledge that in cases in which alleged victims suffer from disabilities which make it difficult for them to communicate, including cases such as the present, it is incumbent upon the court to the extent that it is consistent with the interests of justice and a fair trial, to take whatever steps are reasonable to enable that Complainant's story to be told and justice to be done. It would be wrong, were it possible to secure a fair trial, to prevent any proper complaint being made by reason of any difficulties of communication that the Complainant might have. That is not, in my view, the modern approach to matters of this nature and I am sensible to the right of a Complainant as well as to a defendant to tell their story. 42. Where, however, as here, there are such significant difficulties (which have to an extent been caused or exacerbated by delay or error on the part of the Prosecution authorities with consequent injustice to the defendant) then that tips the balance even more firmly against refusing to allow the 2013 Statement to be used. Authorities AG-v-Humble

[2018] JRC 056B . Criminal Justice (Evidence and Procedure) (Jersey) Law 1998. Police Procedures and Criminal Evidence (Jersey) Law 2003. Regina v D [2003] QB 90. Regina v Sed

[2004] 1 WLR 3218 . Regina v Radak [1999] 1 Cr App R 187. Page Last Updated: 22 Jun 2018 BAILII:
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