

JERSEY / JUDGMENT

AG v Mills [2021] JRC 178 (21 June 2021)

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JUDGMENT

THE DEPUTY BAILIFF: 1. On 8 th June 2021, I gave various decisions in relation to this matter and reserved others. The trial is listed to begin before the jury on 21 st June 2021.

Background

2. The defendant is 26 years old and was 25 years old at the time of the alleged assault which took place on 4 th November 2020. It is alleged that on that day he committed the offence of sexual touching without consent contrary to Article 7(1) of the Sexual Offences (Jersey) Law 2018 upon a female victim who lived in a block of flats in St Helier and was aged 75 at the time. She is now 76. 3. The brief circumstances are that the defendant was, at the time, subject to a prohibition on attending the flats owing to bail conditions imposed upon him preventing him from contacting his ex-girlfriend in relation to separate offences which will be tried by another jury. 4. On 4 th November 2020, the defendant gained access to the flats and was seen on the third floor landing by Miss C (64 at the time, now 65 years old), a resident of the flats. The defendant is alleged to have invited Miss C into his former girlfriend's flat " for a cuddle ". She left the scene and broke a bone in her hand as she fell on the stairs whilst leaving the area. 5. The victim and her friend, Miss D were captured on CCTV returning to the flats at 2.44pm. They were on mobility scooters and went into the underground car park at the flats in order to place them in a storage cage. The defendant went from the third floor (where he had seen Miss C) to the underground car park and it is there that he committed the alleged offence
- touching the victim, rubbing his hands up and down her hips and putting his hand underneath her coat and into the waistband of her jogging bottoms where she could feel the defendant's hand against her bare skin on her buttocks. His left hand then slid across her front and under the bottom of her jacket down the front of her jogging bottoms on the outside. After the incident the victim and Miss D managed to get into the lift. The defendant followed them with his hands in his jogging bottoms, in the area of his genitals. Whilst the ladies went up in the lift, the defendant took the stairs and when the victim and Miss D reached their floor they saw the defendant in the stairway " creeping " towards them. As the victim went into her door with Miss D she was concerned the defendant was going to try to get in. 6. Miss C also joined them in the flat. Miss C says that the victim said to her words to

the effect of " He had his hands all over me. I have called the police ". 7. Miss D says that " [The victim] has asked me to come into her flat as she was shaken up and ushered me inside quickly. I have then remained in the flat where [the victim] disclosed to me that the male had been grabbing her and being inappropriate. [The victim] then phoned the police. " Both complaints appear to have been made at about the time the victim telephoned 999 which was at 2.57pm. 8. The police arrived at 3.06pm and all three women gave their first statements to the police that day. Miss D died in April 2021. The applications 9. There were various applications before me. The first was to adduce Miss D's evidence as hearsay by reason of her death. The second was, to the extent necessary, to adduce the relevant passage of Miss D's evidence as part of a *res gestae* by way of an exception to the hearsay rule and also an application to adduce the relevant part of Miss C's evidence (Miss C is giving evidence) as part of the *res gestae* by way of an exception to the hearsay rule. 10. The second application I heard and determined was an application to adduce certain bad character evidence relating to the defendant. The final application was to exclude the three police interviews of the defendant. Hearsay and *res gestae* 11. Pursuant to Article 65 of the Police Procedures and Criminal Evidence (Jersey) Law 2003 , a statement not made in oral evidence is admissible as evidence of any matter stated in it if oral evidence given in the proceedings by the person who made the statement would be admissible as evidence of any matter, the person who made the statement is identified to the Court's satisfaction, and any conditions listed in paragraph (2) are satisfied. 12. The first condition listed is " that the relevant person is dead ". 13. This condition is plainly met in the case of Miss D. The defence did not object to the evidence being admitted on this basis and there was no suggestion that consideration of the factors under Article 64(2) of the Law which are often relied on by way of a cross check in respect of admissibility should lead to the evidence of Miss D being excluded. 14. In respect of the specific paragraphs of the evidence of Miss D and Miss C, which the Crown sought to adduce by way of an exception to the hearsay rule under the *res gestae* principle, I note that the customary law admissibility of such statements is preserved by Article 64A of the Law. 15. In relation to the evidence of Miss D, is it necessary to consider its admissibility as part of the *res gestae* when the evidence is already admissible under Article 65(2) of the Law? The editors of Archbold appear to suggest not at paragraph 11-80 where it is said " Where the maker of a statement is genuinely unable to attend and the statement therefore satisfies the criterion for admissibility under both [the English equivalent of Article 65] and as part of the *res gestae*, it is important to remember that the evidence will be admissible by virtue of [the English equivalent of Article 65] unless the court excludes it in the exercise of its discretion. " 16. Accordingly, once the evidence is admissible pursuant to one of the relevant gateways (in this case Article 65), in my view, it is admissible for all purposes subject to an application to exclude the evidence under Article 76 of the Law. 17. No such application was made in this case, but it was submitted on the part of the defence that the relevant paragraphs of the evidence of Miss D and Miss C were not admissible as part of the *res gestae* . 18. I do not think that that is right in relation to the evidence of Miss D as her evidence is admissible as set out above. But I proceed on the footing that it was open to the defence to contest that the evidence of either woman fell outside the *res gestae* principle

and go on to consider whether the Crown has satisfied me that they are so admissible. In this regard, it is necessary to consider the principles in the leading cases. 19. In the case of *Lundy -v- AG*

[1996] JLR 193, the Court of Appeal, Bailhache, Bailiff presiding adopted the principles enunciated by Lord Ackner in *R -v- Andrews*

[1987] AC 281. He said at page 36: "In *R. v. Andrews* (3), Lord Ackner summarized the position which confronts the trial judge when faced in a criminal case with an application under the *res gestae* doctrine to admit statements as evidence, with a view to establishing the truth of some fact thus narrated, such evidence being truly categorized as "hearsay evidence." He did so under the following heads ([1987] A. C. at 300-301): "1. The primary question which the judge must ask himself is - can the possibility of concoction or distortion be disregarded?

2. To answer that question the judge must first consider the circumstances in which the particular statement was made, in order to satisfy himself that the event was so unusual or startling or dramatic as to dominate the thoughts of the victim, so that his utterance was an instinctive reaction to that event, thus giving no real opportunity for reasoned reflection. In such a situation the judge would be entitled to conclude that the involvement or the pressure of the event would exclude the possibility of concoction or distortion, providing that the statement was made in conditions of approximate but not exact contemporaneity.
3. In order for the statement to be sufficiently 'spontaneous' it must be so closely associated with the event which has excited the statement, that it can be fairly stated that the mind of the declarant was still dominated by the event....
4. Quite apart from the time factor, there may be special features in the case, which relate to the possibility of concoction or distortion.... The judge must be satisfied that the circumstances were such that having regard to the special feature of malice, there was no possibility of any concoction or distortion to the advantage of the maker or the disadvantage of the accused.
5. As to the possibility of error in the facts narrated in the statement, if only the ordinary fallibility of human recollection is relied upon, this goes to the weight to be attached to and not to the admissibility of the statement and is therefore a matter for the jury. 40 However, here again there may be special features that may give rise to the possibility of error." Lord Ackner concluded his speech with this statement (*ibid.*, at 302): "Where the trial judge has properly directed himself as to the correct approach to the evidence and there is material to entitle him to reach the conclusions which he did reach, then his decision is 1996 JLR 206 final, in the sense that it will not be interfered with on appeal. of course, having ruled the statement admissible the judge must ... make it clear to the jury that it is for them to decide what was said and to be sure that the witnesses were not mistaken in what they believed had been said to them. Further, they must be satisfied that the declarant did not concoct or distort to his advantage or the disadvantage of the accused the statement relied upon and

where there is material to raise the issue, that he was not activated by any malice or ill-will. Further, where there are special features that bear on the possibility of mistake then the juries' attention must be invited to those matters." 20. The defence in this case said that there was time for the victim to have concocted a story and that in view of the passage of time between the incident and the conversation which the Crown seek to adduce, this was not a contemporaneous reaction to unfolding events and falls outside the *res gestae* principles. 21. I disagree. In my view, the possibility of concoction or distortion can be disregarded, and the evidence suggests that the mind of the victim was still dominated by the event when she spoke to her two friends. It is not clear when the alleged assault occurred, but it was certainly after 2.44pm. Both the victim and Miss D were not able to move rapidly and it is not clear how long it took them to reach the victim's flat which, on any view, was the first place of safety in which they could speak freely, bearing in mind the continuing presence of the defendant in the vicinity. Both the two brief conversations that the Crown wish to adduce took place, on the evidence before me, at most 10 minutes and possibly less after the alleged assault and accordingly these are statements made in conditions of approximate but not exact contemporaneity. 22. Accordingly, these statements are admissible as part of the *res gestae*. I will, of course, be careful to direct the jury in accordance with the guidance appropriate to such statements and make it clear that it is for the jury to decide what was said and to be satisfied, if the same was submitted by the defence at trial, that they need to be sure that the witnesses did not make up or misunderstand what it was that they heard. Furthermore, if there are any special features which arise during the evidence which bear on the possibility of the witnesses making a mistake, then I will direct the jury accordingly. 23. Finally in relation to the particular evidence of these two witnesses the subject of the application to adduce the same as *res gestae*, I did consider with counsel the admissibility of this evidence as recent complaint under Article 67(A)(4) and (7) of the Law, but agreed with the defence submission that the victim would either need to give evidence or make a further statement compliant with Article 67(A)(7) for such an application to be viable. The effect of Article 67A and its general utility in relation to previous complaints/early complaints was considered earlier this year in the case of *Rodrigues -v- AG*

[2021] JRC 015 . Character evidence 24. The Crown served two notices to introduce evidence of bad character on 25 th May 2021. The first concerns the fact the defendant was in breach of bail by virtue of his being at the flats on 4 th November 2020. I need to say a little about this issue as the defence agree that this evidence should be admitted as agreed bad character evidence under Article 82E(1)(a) of the Law. The defendant was in breach of court bail imposed on him by the Magistrate's Court on 8 th October 2020 when he attended the flats, the home of his ex-girlfriend. 25. The reason that the defence agree that this evidence should be admitted is because if the interviews of the defendant are admitted, then it will be necessary for the defence to explain why the defendant lied about his presence at the flats on 4 th November 2020. It is said that the reason for those lies in interview was to distance himself from the premises as he knew he was not allowed to

attend them as a consequence of his bail conditions. However, if the application to exclude the interviews was successful, the defence argued that the evidence of the bail conditions was not admissible. The Crown disagreed with that proposition and said that the evidence of the bail conditions was important explanatory evidence and admissible even without defence agreement under Article 82E(1)(c). 26. The difficulty with that argument is that evidence is only "important explanatory evidence" under Article 82E if pursuant to Article 82E(5) "without it, the court or a jury would find it impossible or difficult properly to understand other evidence in the case; and its value for understanding the case as a whole is substantial". 27. The defence offered to make an admission that the reason for the defendant's presence at the flats was that he was (on his case) attempting to contact his ex-girlfriend. In these circumstances, it would not be necessary for the jury to know of the fact that the defendant was in breach of his bail conditions, still less would it be impossible or difficult for them to understand the case without knowing of the defendant being in breach of his bail conditions. Accordingly, on the footing that the Crown and defence are able to agree suitable admissions, then I declined to admit, in the event that the interviews are excluded, this evidence of the defendant's character. 28. The second application that the Crown made in relation to the defendant's character was for admission of the statement of Miss E dated 25th February 2021, in relation to the defendant's alleged sexual interest in older women. Miss E is the defendant's former girlfriend. In her statement she said that a year and a half before she had seized the defendant's phone and found only two photographs in a particular folder. One was of a naked woman between 60 and 70 years old lying on her back with her breasts and genitals visible. The second was a photograph of the same woman. When challenged about it, the defendant is alleged to have admitted that the woman was a porn star and he had watched her videos for a few years. He said "I like older women because they have got more experience". Subsequently, he said that he liked older women and had gone home with a woman in her 30s or 40s and they had slept together. 29. The defence say that the "older woman" who was allegedly 60-70 was in fact in her 50s. 30. The defendant was not asked a great deal of questions in interview about his sexual interests save that he was asked in his first interview if he was attracted to a particular age group and said "Not whatsoever. I am not really a particular. I said I'm not particularly attracted to anyone at the minute. (sic)". The transcript may not be wholly accurate but the sense of the answer appears to be that the defendant was not attracted to a particular age group and was not particularly attracted to anyone at that particular time. 31. The difficulty with the Crown's application is that this evidence (the alleged sexual interest in older women) was not evidence of bad character. The definition of bad character under Article 82C is "evidence of, or of a disposition towards, misconduct". 32. To draw the line between evidence which is or is not capable of amounting to bad character is not always straightforward. Article 82A says that "misconduct" means "the commission of an offence or other reprehensible behaviour". Plainly there is no question of the commission of the offence in this case. As to "reprehensible behaviour" Archbold says at paragraph 13-13: "Whether conduct constitutes 'reprehensible behaviour' is, at its outer limits, a matter of opinion on which views may

legitimately differ." 33. Examples are given in Archbold of behaviour which does amount to reprehensible behaviour including drug taking, sexual promiscuity, making false allegations, gloating over scenes of personal violence and so on. It does not extend to being arrested, or refusing to give a witness statement or to shout at one's partner and child. 34. Does it extend to sexual relationships which are not criminal? There are two authorities of assistance in this regard, namely AG -v- Weir

[2005] EWCA Crim 2866 and R -v- I. J.

[2011] EWCA Crim 2734 . 35. These cases were not referred to by counsel but when the Court identified them in retirement, counsel were informed of the same. In the case of Weir , the defendant aged 39 was prosecuted for sexual offences against a girl aged 13. The Crown adduced evidence of his previous conduct towards other girls which, although not criminal showed a sexual interest in girls of the complainant's age group. The judge held this was reprehensible behaviour and therefore evidence of bad character. The Court of Appeal disagreed. Kennedy LJ, giving the judgment of the Court said: "94. In our combined view, the judge was wrong to conclude that the sexual relationship between the appellant and B, without more, amounted to 'evidence of, or of a disposition towards, misconduct on his part' and therefore evidence of 'bad character' for the purposes of s 98, and therefore ss 101, 102 and 103 of the 2003 Act. The definition of 'misconduct' in s 112(1) is very wide. It makes it clear that behaviour may be reprehensible, and therefore misconduct, though not amounting to the commission of an offence. The appellant was significantly older than B. But there was no evidence, or none that the Crown put forward and the judge ruled admissible, of grooming of B by the appellant before she was 16, or that her parents disapproved and communicated their disapproval to the appellant, or that B was intellectually, emotionally or physically immature for her age, or that there was some other feature of the lawful relationship which might make it 'reprehensible'. Indeed it might be inferred from the simple agreed facts that the relationship with B was a serious one, with some real emotional attachment, because it lasted some time. 95. However, once it is decided that evidence of the appellant's sexual relationship with B did not amount to 'evidence of bad character', the abolition of the common law rules governing the admissibility of 'evidence of bad character' by s 99(1) did not apply. We have no doubt that evidence of the relationship was admissible at common law, in the particular circumstances of this case, because it was relevant to the issue of whether the appellant had a sexual interest in A. It was capable of demonstrating a sexual interest in early- or mid-teenage girls, much younger than the appellant, and therefore bore on the truth of his case of a purely supportive, asexual interest in A. It was not in our judgment unfair to admit the evidence (see s 78 of PACE). 96. Although the judge came to his conclusion as to the admissibility of the appellant's relationship with B by a different route, his direction to the jury as to its possible relevance was fair and accurate. He directed them that it was for the jury to decide whether it had any relevance. He reminded them that the age of consent was 16: " It is something that you can take into account in deciding whether he might have been attracted to [A]. It does not mean that he would have behaved as she says that he

behaved; that is assaulting her sexually. To state the obvious, you can be attracted to someone without assaulting them."" 36. Accordingly, in my view the defendant's sexual interest in much older women in this case, as alleged by the Crown, is not evidence of bad character per se but it may be admissible at customary law because an issue in the case is or may be whether or not the defendant had a sexual interest in the victim. 37. In R -v- I. J. Pitchford LJ giving the judgment in the Court of Appeal, dealt with the admissibility of the defendant's homosexuality as bad character evidence. The defendant was married and the allegation was that he had indecently assaulted his stepson and son some years before. The Court of Appeal said at paragraph 32: "32. The fact that a heterosexual man indulges what he thinks is the homosexual side of his sexual nature consensually with another man or men over the age of consent does not in the year 2011 constitute reprehensible behaviour. It is not argued on behalf of the appellant that such evidence does constitute bad character for some other reason, such as its context within a marriage between a man and a woman, presumably because that was not the purpose advanced for its admission.

33. We, therefore, consider this appeal upon the basis that if the evidence was admissible at all, then it was at common law subject to section 78 of the Police and Criminal Evidence Act 1984. One of the appeals conjoined with Weir and Others

[2005] EWCA Crim 2844,

[2006] 1 WLR 1885 , was Manister .

34. Kennedy LJ, delivering judgment of the court, considered Manister's appeal at paragraph 76 and following. The appellant, aged 39 at the time of the alleged offences, was convicted of indecently assaulting a 13 year old girl, the daughter of a male friend in whose home he had lived for a time. The prosecution had successfully applied to the trial judge for the admission of evidence that the appellant had earlier indulged in a sexual relationship with a 16 year old girl. [The Court of Appeal then went on to consider the decision in Manister and Weir]
37. In our view, similar reasoning applies to the present case. A sexual attraction by one male for another is still, we think, sufficiently unusual to make that disposition relevant to the question whether this appellant had an innocent or sexual association with his own male children. The evidence, of course, should not have been admitted if its prejudicial effect would outweigh its probative value.
38. We accept that the probative value of this evidence was modest. We do not, however, conclude that the judge's decision was wrong. At the time when the judge made his decision to admit the evidence he was correct, in our judgment, to conclude that it was relevant. At the time when the decision was made, however, we do not agree that the evidence was admissible in order to counteract any false impression which the appellant attempted to give merely by asserting in the course of his interview that he was married for a period of 15 years." 38. Accordingly, I directed that this was not bad character evidence but if, during the evidence of the defendant, if he gives evidence, the defendant was to state that he did not have any sexual interest in older women or for any other appropriate reason then I will

revisit my ruling in relation to the admissibility of this evidence (insofar as it may be admissible at customary law) if asked to do so. The interviews 39. In relation to the interviews, a *voire dire* was held and the interviewing officer and custody officer both gave evidence. 40. The first interview took place on 5 th November 2020, commencing at 16.01hrs and concluding at 17.05hrs. The second interview on 6 th November 2020 was shorter, commencing at 17.31hrs and the third interview on the same day again was a short one, commencing at 18.06hrs. In all three interviews, the defendant declined legal advice and no appropriate adult was present. In all three interviews, the defendant was cautioned and offered free legal advice and indicated that he was content to proceed with the interview. 41. The defence application to exclude the interviews is made on the following bases: (i) The interviews were conducted in breach of Code C of the Law because the interviewing officers failed to treat the defendant as mentally vulnerable and conducted the interviews in the absence of an appropriate adult and a legal representative; and/or (ii) The interviews are unreliable and should be excluded under Article 74 of the Law; and/or (iii) In the circumstances, the admission of the interviews into evidence so adversely affects the fairness of the proceedings that the Court ought not to admit them under Article 76 of the Law. 42. It is appropriate to set out the relevant provisions of the Code and the statutory provisions and their effect before considering the evidence that was heard on the *voire dire* , the arguments submitted by counsel and my ruling on the admissibility of this evidence. Code C 43. 1.4 of Code C provides: " If an officer has any suspicion, or is told in good faith, that a person of any age may be mentally disordered or mentally vulnerable, or mentally incapable of understanding the significance of questions put to the person or his or her replies, then that person shall be treated as a mentally disordered or mentally vulnerable person for the purposes of this Code. " 44. Paragraph 1.4 cross refers to Note 11 which says: "Mentally vulnerable" applies to any detainee, who, because of his or her mental state or capacity, may not understand the significance of what is said or his or her replies. "Mental disorder" is defined by Article 1(1) of the Mental Health (Jersey) Law 2016 as any disorder of disability of the mind, not including a learning disability (unless the person suffering that disability shows abnormally aggressive or seriously irresponsible conduct), nor dependence on alcohol or drugs. Where the custody officer has any doubt about the mental capacity of a detainee, the detainee should be treated as mentally vulnerable and an appropriate adult called. " 45. Paragraph 3.10 of the Code says: " If the person is a juvenile, is mentally vulnerable or is suffering from mental disorder then the custody officer must as soon as practicable inform the appropriate adult of the grounds for his or her detention and his or her whereabouts, and ask the adult to come to the police station. When information is given to the person as required in paragraphs 3.1 to 3.5, then the information must be given to the detained person in his or her presence. If the appropriate adult is not at the police station when the information is given then the information must be given to the detained person again in the presence of the appropriate adult once that person arrives." 46. Paragraph 3.13 of the Code says: "If, having been informed of the right to be afforded facilities to consult a legal representative in private under paragraph 3.10 above, either the appropriate adult or the detained person considers that legal advice should be taken, then the provisions of

section 6 of this Code apply." 47. Paragraph 13.1 of the Code says: " A juvenile or a person who is mentally disordered or mentally vulnerable, whether suspected or not, must not be interviewed or asked to provide or sign a written statement in the absence of the appropriate adult unless Annex C applies. If the person is cautioned in the absence of the appropriate adult, the caution must be repeated in the adult's presence (unless the interview is by then already finished)." 48. The guidance note 13B says: " It is important to bear in mind that, although juveniles or persons who are mentally disordered or mentally vulnerable are often capable of providing reliable evidence, they may, without knowing or wishing to do so, be particularly prone in certain circumstances, to provide information which is unreliable, misleading or self-incriminating. Special care should therefore always be exercised in questioning such a person, and the appropriate adult involved, if there is any doubt about a person's age, mental state or capacity. Because of the risk of unreliable evidence it is also important to obtain corroboration of any facts admitted whenever possible." 49. Annexe E to Code C provides a summary of provisions relating to mentally disordered and vulnerable persons which provides: "(1) If an officer has any suspicion or is told in good faith that a person of any age, whether or not in custody, may be mentally disordered or mentally vulnerable, or cannot understand the significance of questions put to the person or his or her replies, then the person shall be treated as a mentally disordered or mentally vulnerable person (paragraph 1.4).

- (2) In the case of a person who is mentally disordered or mentally vulnerable, "the appropriate adult" means -
- (a) a relative, guardian or some other person responsible for his or her care or custody; (b) someone who has experience of dealing with mentally disordered or mentally vulnerable persons but is not a police officer or employed by the police; or (c) failing either of the above, some other responsible adult who is not a police officer or employed by the police. (3) If the custody officer authorises the detention of a person who is mentally vulnerable or is suffering from a mental disorder the officer must as soon as practicable inform the appropriate adult of the grounds for the person's detention and his or her whereabouts, and ask the adult to come to the police station to see the person. If the appropriate adult is already at the police station when information is given as required in paragraphs 3.1 to 3.5 the information must be given to the detained person in his or her presence. If the appropriate adult is not at the police station when the information is given then the information must be given to the detained person again in the presence of the appropriate adult once that person arrives. (paragraph 3.8)." 50. It is said that in this case the officers either knew at the outset or came to know of the need for an appropriate adult during the course of the first interview; that the defendant's answers in his interviews were unreliable, misleading and self-incriminating and he would not have given such answers, including what is described as making " confessions " in his first interview and telling lies about his presence at the flats in all three interviews had the appropriate safeguards been available to him. In the case of X -v- AG [2014]

- (2) JLR 384, the Court of Appeal said at paragraph 31: " Code C makes it clear that the decision as to a potentially vulnerable witness's fitness to be interviewed rests ultimately with the custody officers. There might be situations where, despite having sought a medical opinion, the custody officer might still have concerns which, in view of the need to err on the side of caution, would require him to treat a suspect as mentally disordered or vulnerable. It is also to be noted that the duty of the police is ongoing; there could be instances where an interview commences without any concerns about the suspect but during the course of the interview, officers may become suspicious and will then have to suspend the interview to establish whether the attendance of an appropriate adult is required. " 51. On the facts of that case the arresting officers and the interviewing officers were held to have had no cause for concern from their observations of the appellant, the FME had confirmed the appellant's fitness for interview, and it was reasonable for the interview to proceed without an appropriate adult. The Court of Appeal said " To hold otherwise would discourage the police from instructing a medical expert to assess a suspect if they have even the slightest ground for concern and that must be wrong " . 52. It was submitted that there was a " significant and substantial " breach of Code C. Both parties were agreed that a breach of Code C on its own may not lead to exclusion of an interview either under Article 74 or Article 76. Conversely, there may be circumstances which lead to exclusion of an interview, either under Article 74 and/or Article 76, without the proof of a breach of Code C. 53. In the event that the Court did not find that there were fundamental breaches of Code C, the Court was invited to exclude the interview as " unreliable " having regard to the provisions of Article 74 of the Law. 54. The material parts of Article 74 of the Law provide: "(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 ." 55. The effect of Article 74 is that once the defence make a representation that the " confession " was or may have been obtained in the circumstances set out then it is for the prosecution to prove to the criminal standard that it was not. In this case there is no allegation of oppression, but it was said that the prosecution could not and did not prove that the confession was reliable by reason of the " circumstances existing at the time " in Article 74(2)(b). As to the reference to " anything said or done " in Article 74(2)(b) it is not necessary for the police to have said anything in particular or asked questions in a particular way so as to render any confession unreliable. It is sufficient for the Court to find that any confession was or may have been unreliable owing to the absence of an appropriate adult. In AG -v- X at paragraph 53 the Royal Court approved the decision of the English Court of Appeal in Gill and Others

[2004] EWCA Crim 3245 and agreed that " The words "anything said or done" are wide enough to include an omission to interview a suspect without the presence of an appropriate adult, in circumstances where the Code of Conduct requires one to be present . " 56. The truth or otherwise of the confession is irrelevant for the purposes of Article 76 - the focus of the Court is on reliability. As to the reference to " confession ", it is not necessary for there to be an admission to the offence for the Court's powers to exclude an interview under Article 74 to be engaged. " Confession " is not defined in the Law but in the equivalent English legislation it is defined as including " any statement wholly or partly adverse to the person who made it, whether made to a person in authority or not and whether made in words or otherwise. " This is a useful working definition of the word " confession " and would incorporate, as contended for by the defence and as relevant to this case, lies which are relied upon by the Crown together with adverse statements which fall short of an admission to the offence but upon which the Crown is likely to rely. 57. In support of the defence contentions under Article 76, heavy reliance is placed upon the report of Dr Gould which was not available to the police at the time of the interview and was prepared for the purpose of these proceedings. Dr Gould is a clinical psychologist and examined the defendant and carried out various tests in March this year in respect to the consequences of the brain injury that the defendant suffered following a motocross accident on 8 th May 2010 when he was 15 years old. 58. Dr Gould assessed the defendant's IQ as 86 which is in the " low average " range and is higher than or the same as 18% of the population. His score for working memory and processing speed are average at 97, meaning that he performed better than approximately 42% of his peers under both measures. 59. His verbal comprehension score is 74 which is described as " borderline ". 96% of his peers will have gained a higher score. His perceptual reasoning score is 94 which is " average " - he would have performed better than approximately 34% of his peers. As to the defendant's memory, his visual memory is average, his visual working memory is low average and his immediate memory and delayed memory are " borderline ", only 3% of his peers would have scored lower and his auditory memory is extremely low - over 99% would have gained a higher score. Auditory memory is a measure of the defendant's ability to listen to information and repeat it and then recall it after a 20-30 minute delay. His immediate memory recall and delayed memory recall are both lower than would be expected, given his general intellectual ability according to Dr Gould. 60. The defendant does not meet the criteria for a diagnosis of a learning disability as his IQ is above the relevant threshold. 61. However, he would benefit from assistance during the trial to ensure that communication with him was simple and concrete and would benefit from regular breaks during the proceedings. For this reason I granted the application for an intermediary to assist him during the course of the proceedings. 62. Subsequent to her report, Dr Gould arranged for the defendant to be assessed by reference to the Gudjonsson Suggestibility Scale, which she was able to produce by way of an addendum to her report having tested the defendant on 2 nd June 2021. This scale matches the impact of suggested questions and interpersonal pressure on the answers given to questions. The purpose of the examination is to ascertain how suggestible a person is and the extent to

which they can be misled by questions. Dr Gould says there are three types of suggested questions - leading questions (which contain the answer); affirmative questions which have a particular suggestive effect and "false alternative questions" which imply the presence of object or persons or events that were not features of the account/story. Dr Gould concluded that the defendant's scores indicated that he was "Highly suggestible in the way the questions were asked of him. He was particularly influenced by false alternative questions, but also to leading and affirmative questions. He was susceptible to pressure to change his answer, however, this was not to the same extent." His scores for total suggestibility indicate that 90% of adults in the general population would have been less influenced by these types of questions and pressure to change an answer. 63. It was not suggested that in this case any "false alternative questions" were put to him by the police. Indeed, to do so would be improper. It was not suggested to the officers that they in fact asked any inappropriate leading questions although, as I will examine later in this judgment, there were certain leading questions asked, as there usually are in the course of an interview. 64. Finally, the defence suggest that, in the alternative, the interview should be excluded under the provisions of Article 76 of PPCE. The relevant provisions of Article 76 are: "76 Exclusion of unfair evidence (1) Subject to paragraph (2), in any proceedings a court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would so adversely affect the fairness of the proceedings that the court ought not to admit it. (2) Nothing in this Article shall -

- (a) prejudice any rule of law requiring a court to exclude evidence; or
- (b) apply to extradition proceedings or proceedings pursuant to Article 19 of the Loi (1864) réglant la procédure criminelle. (3) Nothing in this Law shall prejudice any power of any court to exclude evidence, whether by preventing questions from being put or otherwise, at its discretion." 65. The defence argue taking into account the absence of an appropriate adult, the absence of legal advice, the cognitive deficiency that the defendant suffers from following his brain injury, and the defence argument regarding reliability that it would, in any event, not be fair to admit the evidence of these three interviews pursuant to Article 76. The evidence heard on the *voire dire* 66. As indicated above, two officers gave evidence. The defendant did not give evidence. It is not generally the case that defendants give evidence on a *voire dire*. Sometimes they do but generally where the allegations are breach of the code defendants do not give evidence. The evidence of Dr Gould was not given orally, and I treated it, for the purpose of the *voire dire*, as unchallenged evidence. 67. The first witness was Detective Constable Samuel James de la Haye. He is a Detective Constable who joined the States of Jersey Police in 2013. However, for a period of two or three years commencing from 2018 he was an Acting Police Sergeant working in custody. Accordingly, by 5th November 2020 he was a reasonably experienced Custody Sergeant. On 5th November he was the Custody Sergeant when the defendant was admitted to custody. He said that his role was to ensure that the Codes of Practice were complied with. He was on duty when the

defendant arrived in custody having been arrested. He was asked various questions about the custody record which was in the papers before me. He said, as is set out in the custody record, that the defendant was calm and co-operative when he arrived at the police station. He asked the defendant a number of standard questions in relation to any current injuries, medication and the like in order to ascertain whether or not the defendant needed to see the police doctor. There was a reference to an historic knee injury in the record which would have been something that the defendant had told DC de la Haye. The custody record indicated that the defendant declined his legal rights to legal advice and to notify a named person of his arrest. Each relevant entry was initialled by the defendant. This would have occurred after the record had been printed out - the entry having been typed into the custody log by DC de la Haye when the defendant's various answers were given. 68. The "risk assessment", which is completed in relation to all suspects noted, having gathered information from the defendant says: "DP [detained persons] 20 th time in custody. History of depression for which he takes tablets. He is up to date with this having taken his medication this morning and not needing any further until tomorrow morning. DP was very calm and polite when booked in. He is sober and declined FME (Force Medical Examiner) assistance, answering no to previous or current self-harm and having no other medical issues. L1 60 minute checks, awaits interview." 69. DC de la Haye explained these entries. As to the 20 th time the defendant had been in police custody, DC de la Haye had dealt with him before in 2020. On that occasion he had presented differently as he was drunk and aggressive, and it took several officers to put him in his cell. As to the reference to his history of depression, DC de la Haye said that the defendant would have told him about this at the time. He said that the defendant had told him that he was up to date with his medication and that he did not need to see a doctor. DC de la Haye said that he "saw no reason to override that". 70. The reference to Level 1 checks was the lowest level of checking that a suspect could be categorised. Level 2 was a 30 minute rousing check every 30 minutes. Level 3 involved a cell guard - an officer observing the defendant directly, and Level 4 required an officer to sit in the cell with the cell door open. 71. DC de la Haye said he categorised the defendant as Level 1 because it was 10am in the morning when he was admitted to custody, he was compliant and there were no concerns. He saw no evidence of mental problems and he was content that the defendant understood the booking-in process. The defendant told the officer that he had not self-harmed himself and he was on top of his medication. DC de la Haye repeated that he did not consider that a doctor needed to be seen in his interest. He said he did consider whether an appropriate adult was required as it was considered in every case. But based upon the defendant's presentation at the time, there were no causes for concern. He also checked the previous five or six custody records and saw the defendant had been interviewed several times without one and, more importantly, had been assessed by doctors on previous occasions and not found to need an appropriate adult. He said that officers did look for signs of mental disorder but he could detect none in the defendant's case

- he concluded the defendant understood matters and did not need an appropriate adult. 72. DC de la Haye went off-duty later on that day and his last direct involvement with the defendant was the risk assessment. He was not present at the next custody review which took place at 14.44hrs that day. That was carried out by the Inspector and the review notes indicate, inter alia, that the defendant was reminded of his rights to legal advice, third party notification and to consult the Codes of Practice. It was recorded that he had "understood all that was said to him" and was in "good spirits, calm and compliant". The record did say that he was "confused as to why he had been arrested for this specific offence." DC de la Haye's shift ended at 17.00hrs. 73. DC de la Haye confirmed that the defendant was examined by a doctor on the evening of 5 November just after 18.00hrs, for the purpose of a pre-release assessment. Dr Langtree noted that the defendant had a history of depression but no attempts at self-harm or suicide, he was going home to his mother and planned to go to work on Monday. The entry said that he was sign-posted to the Samaritans, A&E, and the Drug and Alcohol Service. He was fit for release and medication was given to ease his anxiety. DC de la Haye said that the reference to Samaritans and the Drug and Alcohol Service was "entirely normal". 74. When he was cross-examined, DC de la Haye agreed that depression was a mental illness but he felt that the defendant was managing it by taking his medication. He accepted that although the defendant had been admitted to custody on previous occasions, each risk assessment must be conducted afresh. He also said that they would have taken into account the fact that he was assessed as "Level 2" earlier in the year but it was the presentation on the day which was most important for the purpose of assessment. DC de la Haye said that he would have instructed the doctor to carry out a general assessment and also an assessment to see if an appropriate adult was necessary if he felt it was required. He said that they would have been concerned by evidence of a previous head injury and would have arranged for a doctor to be called for the purpose of assessment if he had known of one. 75. DC Jeremy Percival was the interviewing officer and the second witness. He has spent 21 years in the States of Jersey Police and said that he had conducted over 1000 interviews during that period. He had substantial experience in dealing with mentally vulnerable people, referring them to the FME and arranging for attendance of an appropriate adult. 76. He conducted all three interviews, the first with DC Carvalho and the second and third with DC Coleman. The first interview lasted just over an hour. Before the interview DC Percival would have reviewed the defendant's "nominal" record on the system which would have set out any "warnings" in relation to the defendant and details of his address and previous convictions. "Warnings" may include details of known mental health difficulties. He said that nothing in the defendant's nominal suggested that he was mentally vulnerable. No interview would take place until the Custody Officer had confirmed that a suspect was fit to be interviewed. Usually the interviewing officers would go to the Custody Suite and walk the suspect into the interview room. There was nothing alarming or concerning about the defendant's appearance. The interview began with a number of standard questions from a template. The defendant's answers showed that he knew and understood the questions. In particular, he answered the question about the meaning of the caution (which the defendants sometimes find difficult). Having been cautioned he was

asked what the caution meant and he replied, " um that I don't have to say anything if I don't wish to do so ... um and that anything that I may say could be, could go against me ." 77. The defendant was asked if he had seen a doctor since he had arrived, and he said that he had not. He told the interviewing officers that he was taking anti-depressants and when he was asked if he felt drowsy or anything, he said " none whatsoever ". 78. The defendant confirmed that he was fit to be interviewed. Just over halfway through the interview the officer asked if apart from depression did he have any other mental health issues that he was aware of, the defendant said, " Uh just a brain injury which I had in 2010 ." The defendant said that he was " put into an induced coma ". He went on to say that he had been to CAHMS and seen other specialists. The defendant said that the injury caused him problems. He was asked to describe them and said " short-tempered". Um sometimes not making the right decision and not realising until after. Sometimes just not even knowing what I have done ." DC Percival said that the fact that the injury was ten years ago and that the defendant had understood all his questions did not lead him to stop the interview and refer the defendant to a doctor. I will return to the contents of the interviews in more detail below. The reference to the head injury did not make DC Percival more concerned about the defendant's mental vulnerability. If he had been concerned he would have stopped the interview. The other interviewing officer did not raise any concerns of his own. 79. DC Percival said that the assessment by Dr Langtree after the first interview was at his suggestion because the defendant had said that he had been depressed the day before. He felt that as the defendant had been arrested for a sexual offence there should be a pre-release risk assessment to ensure there was no risk of self-harm. 80. The second interview took place between 17.31 and 17.46 the next day. Again, the fact that the defendant had seen a doctor earlier that day (this time his own GP) did not give rise to any additional concerns on the part of DC Percival. The defendant, as far as he was concerned, was behaving normally and engaging with the interview. The defendant repeated the story he had given the previous day - he had given a detailed account denying his presence at the flats and going fishing near La Collette. The third interview took place between 18.06 and 18.14 in order to deal with the question that the officers had omitted to ask the defendant during the second interview. 81. The custody record showed that that night the defendant was assessed again by a doctor, this time by Dr Rud, at 21.49. The Crown say this is an important review as Dr Rud had noted that " he was on medication for depression ". " FTD [Fit for Detention] and FTI [Fit to be Interviewed] confirmed and no concerns at present ". 82. The defendant was seen by a third doctor, Dr Evans at 9.47 a.m. the following morning and confirmed to be fit for transfer to the Magistrate's Court. The purpose of Dr Evans seeing him was probably to give him the medication which was referred to by Dr Rud in his entry in the previous evening. 83. DC Percival said that there was nothing in these medical examinations to suggest that the defendant needed an appropriate adult. 84. When he was cross-examined, DC Percival said that he did not accept that depression was a mental illness or that depression necessarily made a person mentally vulnerable. He said that he was not a doctor and it will all depend on how someone was presenting. 85. He accepted that a brain injury was a risk factor, but that it had occurred 10 years ago and the defendant did not mention it

when he came into custody. It was a " historic " and he repeated that he thought the defendant was presenting perfectly rationally. When making an assessment of someone's presentation, DC Percival said that he would take into account their understanding of the questions, their level of engagement, and what they said. The defendant was "presenting perfectly normally and engaging". He said that when he asked for the pre-release assessment to be carried out he may have mentioned the brain injury - he could not remember

- but he certainly mentioned the defendant's depression for which he was receiving current treatment. 86. He said that he had examined all 19 previous custody records for the purpose of the *voire dire* , and noted that 5 of the 19 mentioned the brain injury. He was not aware of this at the time. He explained the role of an appropriate adult was to facilitate communication and to make sure that the interview was conducted properly and fairly. He said that if the custody sergeant had said that an appropriate adult was required then that advice would have been followed. He agreed that after the three interviews had been completed the police received a telephone call from the defendant's sister in which she spoke about her " mental health concerns " for the defendant. The custody officer noted that he " re-assured " her. 87. In the notes of the custody review at 20.00hrs on 6 th November showed that the defendant was then " aware of the reason for his detention and made no representations ". Again he was reminded of his rights to legal advice etc. The defendant was told that the police had spoken to his sister and that his grandmother was well. The defendant was "a ppreciative " of the update and said that he had been " looked after well in custody ". Decision (Code C Breach) 88. The Crown's case was that neither officer believed the defendant was mentally vulnerable or suffering from a mental disorder; the officers had given evidence properly and candidly. It was argued that DC Percival had looked to the situation in the round and did not feel that the defendant was mentally vulnerable. Neither officer had any suspicion that the defendant was mentally disordered or vulnerable. The Crown said that their submissions were reinforced by the finding of the second doctor, albeit after the interviews, that the defendant was fit to be interviewed. 89. None of the three doctors who saw the defendant in custody knew of his brain injury. The defence said the fact that the defendant was assessed by his GP during this period was irrelevant as the Court did not know his findings (I accept this). The Defence said there was enough material before the Police, Detective Constable Percival in particular, to have suspected that the defendant was mentally vulnerable. Both officers were both aware of his depression and DC de la Haye said that he would have asked for a medical assessment had he had been aware of his head injury. The defence said that DC Percival's refusal to accept that depression amounted to a mental illness was unreasonable and wrong; the first interview should have been suspended and the interviews should be excluded by reason of the breach of Code C. 90. Having considered the evidence. I find there was no breach of Code C. The Police in this case were acting in good faith and did not suspect that the defendant was mentally disordered or mentally vulnerable, or incapable of understanding the questions put to him. The defendant was seen by three doctors whilst in interview and one specifically confirmed that he was fit

to be interviewed. Article 74 91. I have already set out the terms of Article 74 and the relevant conclusions of Doctor Gould which, although they were matters that were not known to the Police at the time of the interviews and therefore irrelevant to consideration of breach of code are certainly relevant to the Court's decision under Article 74. 92. It is of note that it was not suggested to DC Percival that any of the questions asked by the police were oppressive, leading or in any way inappropriate. 93. I have considered the interviews in detail but it is not necessary for me to summarise the interviews. Suffice to say the majority of the interviews consist of the defendant giving consistent and detailed denials of the offence and, in particular, his attendance at the flats. He gave a detailed account of how he got to where he said he went fishing, how long he spent there (five or six hours) and precisely what he caught. Later he gave an alibi for the evening, saying that he was home alone until his sister came back. Most of the questions asked were enquiring, open questions and not leading ones. 94. When he was asked about his private life and the last time he had had sexual intercourse, he said to the officers " the same question back to you ". Towards the end of the first interview, when the specific statements of the complainant and her friends were put to him, he did prevaricate and in response to specific questions, such as when the officer suggested that the description given by a witness was " probably " him said that it " probably " was, and suggested that during or after his fishing he had drunk more beer than he had thought. However, during his second and third interviews he remained consistent in his denials of attending the premises or committing any offence. 95. Both counsel relied upon passages in the case of AG -v- X , to which I have already referred. That concerned a defendant with a lower IQ (of 78) who was in the most suggestible 5% of the population on the Gudjonsson scale and was said to be " particularly suggestible and compliant ". That was another case of a person who was interviewed in the absence of an appropriate adult. On the facts of that case, which in many respects were different to this, the Court held that there was no breach of Code C. 96. As to the argument under Article 74, the Court said this about the interview at paragraph 43: "The transcript of interview runs to 44 pages. There is no doubt that during the first 20 pages the interviewing officers did put leading questions to the defendant and put him under pressure. They did not hesitate to express their view of what they had heard, and they were not concerned about putting direct and difficult questions to the defendant, including statements expressly or impliedly doubting the answer which he gave. Nonetheless ... the defendant resolutely stood up to this questioning and maintained his denials." 97. The defendant in that case then went on to make certain admissions. The Court rejected certain aspects of the evidence of Dr Carstairs, a clinical psychologist instructed on behalf of the defendant, and the judge concluded at paragraph 45: "that notwithstanding the defendant might have a tendency to be suggestible and compliant, or might be regarded as more suggestible and compliant than the vast majority of the population, nonetheless the admissions which he made in this question and answer interview are reliable." 98. The Court went on to hold that the admissions were voluntary and reliable notwithstanding the absence of a legal adviser. The Court noted in that case that the defendant was in employment and not socially isolated and when looked at " in the round " the confession was, in the view of the judge, a reliable one. The Court of

Appeal held that the Deputy Bailiff was correct to hold that the appellants confession be admitted. 99. Having regard to all the circumstances, I am satisfied that the contents of the interview were voluntary and amounted to a reliable expression of what the defendant wanted to say at the time. Accordingly, I am satisfied so that I am sure that the interview and, in particular, the aspects which can be regarded as amounting to a confession to the extent that they are adverse to the defendant, was not obtained as a consequence of anything said or done which was likely in the circumstances to render unreliable its contents. Article 76 100. In considering fairness under Article 76, a balance has to be struck between what is fair to the prosecution and what is fair to the defence. I note from paragraph 15B-19 of Archbold that it is undesirable to attempt any general guidance as to how a judge's discretion under the English equivalent to Article 76 should be exercised, although there is no need for proof of impropriety for the exercise of the Court's discretion to exclude evidence under Article 76. 101. I do not think it is appropriate to exclude the whole of the interviews under Article 76 and indeed it might be difficult to justify doing so in view of the conclusions I have reached in respect of the arguments under Article 74. However, the defence do invite me (and I will in any event) to consider excluding particular statements of the defendant which, in my view, adversely effect the fairness of the proceedings such that the Court ought not to admit them. In this regard I am concerned about some specific exchanges towards the end of the first interview where the defendant gives equivocal answers which the Crown may say are tantamount to admissions, in the context of the police expressing opinions upon which the defendant is invited to comment/respond. In the context of the evidence of this defendant's suggestibility answers flowing from these questions, in my view, ought to be excluded. Accordingly, the passage of questions which flow from the penultimate question on page 32 " So I get the sense you think this is probably. This is you. " need to be excluded up and until the third reply of the defendant on page 33. Secondly, the passage commencing on page 35 with the police question " I am sure this lady has been assaulted " until the ante-penultimate answer of the defendant " I think so yeah " on the same page needs to be excluded. Thirdly, the third question on page 36 " With the incidents you had in 2010 that sometimes just making the wrong decision until it's too late " and the reply and the subsequent police comment " To realise it afterwards " should also be excluded. 102. By excluding this material only, I do not mean to convey that the balance of the interview is relevant. For example, the entirety of page 33, save for where I have specifically excluded it, appears to be to be irrelevant, relating as it does to the defendant's relationship with his ex-girlfriend which is only relevant to a limited extent in this case. 103. So, to that limited extent I hold that certain passages in the first interview must be excluded before the interviews, as edited, go before the jury. There are no such passages in the second and third interviews. I indicated to counsel at the directions hearing last week that there will need to be substantial editing of the interviews prior to trial, in order for the jury not to be troubled by irrelevant exchanges. Postscript (added 28 th June 2021) This postscript is added after the conclusion of the trial of the defendant which commenced on 21 st June and concluded on 23 rd June 2021. At the time that the application to admit the two statements referred to above on the grounds that they

were part of the res gestae was made, I was aware of the fact of the 999 call, but the contents of the same were not drawn to my attention, nor was I alerted to the fact that the parties had agreed that it should be admitted into evidence. The transcript of the 999 call (which I did not see until the day of the trial) was contained in the jury bundle. Counsel did not address me (and this is no criticism) as to whether or not it had been agreed that the 999 call was admissible by virtue of the res gestae principle or pursuant to Article 67A of the Law. In any event, the purpose of this note is to indicate that having heard the evidence, it was clear that the 999 call was made immediately after the victim had told Miss D what had happened to her and moments before the victim spoke to Miss C. Miss C's evidence to the jury was that she followed the defendant up to the third floor in the next lift and went to the victim's flat to check on her, and that the victim said that the defendant had just come out of the lift, had seen where she lived and that she had "just dialled 999". It was clear from the oral evidence of the victim and Miss C that the two complaints made by the victim were made very shortly after the assault upon her. Authorities Sexual Offences (Jersey) Law 2018. Police Procedures and Criminal Evidence (Jersey) Law 2003. Archbold Criminal Pleading, Evidence and Practice. Lundy -v- AG

[1996] JLR 193 . R -v- Andrews [1987] AC 281. Rodrigues -v- AG

[2021] JRC 015 . AG -v- Weir

[2005] EWCA Crim 2866 . R -v- I. J. [2011] EWCA Crim 2734. X -v- AG

[2014] (2) JLR 384. Gill and Others [2004] EWCA Crim 3245 Page Last Updated: 13 Jul 2021 BAILII: [Copyright Policy](#) | [Disclaimers](#) | [Privacy Policy](#) | [Feedback](#) | [Donate to BAILII](#)

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