

JERSEY / JUDGMENT

AG v Murphy [2019] JRC 233 (05 December 2019)

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[2019] JRC 233 [New search] [Help] Criminal Hearing - grave and criminal assault - introduction of bad character evidence - reasons. [2019]JRC233 Royal Court (Samedi) 5 December 2019 Before : J. A. Clyde-Smith OBE., Commissioner, sitting alone. The Attorney General -v- Laurie Ian Murphy E. L. Hollywood, Crown Advocate for the Attorney General. Advocate A. M. Harrison for the Defendant. . JUDGMENT introduction of bad character evidence THE commissioner: 1. Following a hearing on 11 th November, 2019, I granted the prosecution's application for the introduction of evidence of the bad character of the defendant, pursuant to Article 82F(1)(a) of the Police Procedures in Criminal Evidence (Jersey) Law 2003 , as amended, ("PPCE"), into criminal proceedings in which the defendant faced one charge of grave and criminal assault for which he was due to stand trial on 13 th November, 2019. I now give my reasons. 2. The prosecution case against the defendant, taken from the Prosecution Case Summary, was as follows:- "7. On Saturday 20 April, 2019 at approximately 4:30 p.m. ... ("the Complainant") visited a friend in hospital. Once there the Complainant found his friend asleep so he left. As he walked through the hospital reception area he saw a male (the Defendant) he recognised sat with two others. The Complainant recognised the Defendant as an associate, possibly the boyfriend, of [...] and saw that he had his left arm in a blue cast/sling. Whilst the Complainant did not personally know the Defendant, he knew of his then girlfriend, [...]. 8. Upon leaving the hospital the Complainant headed across the parade towards Cannon Street towards his home in Great Union Road. When in Cannon Street the male in the blue sling (the Defendant) approached him and asked him if he was a Street Doctor. The Complainant responded he had hoped to be one, but he didn't have the right qualifications so it hadn't happened. The Defendant then introduced a female to the Complainant saying she was his little sister. The Defendant then accused the Complainant, who didn't know the female (save for previously having offered her food one evening), of having had ulterior motives by being so generous by offering her food. The Complainant denied this saying he was

married with a child. He then tried to walk away but the Defendant ran up to him, saying to him he had a PHD and he needed his help. The Complainant told the Defendant he didn't and told him to leave him alone, he then turned into Aquila Road. The Defendant again ran after him shouting at him, saying he had a broken shoulder, to which the Complainant told him to go to Accident & Emergency. 9. The Complainant describes how the Defendant then struck him hard in the area of his left temple with an object held in his right hand. The item was described as being black with three silver/metallic prongs on the end of it, similar to a six inch cattle prod. The Defendant struck the Complainant once, looked at him for a second then walked off in the direction of the shop in Aquila Road. The Complainant remained standing but blood started pouring from his injury. He headed home but looked back and saw the Defendant standing outside the shop with two girls. The Complainant returned to his home nearby, from where he telephoned the State of Jersey Police..." 3. The complainant gave a description of his assailant (who he recognised but did not know by name) to the police and identified the defendant in a Promat Video identity procedure. 4. In his Defence Case Statement. the defendant admitted being in the reception of the General Hospital that afternoon, and leaving to go to Aquila Stores, but denied any interaction with the complainant whatsoever. Assuming the jury found that the complainant had indeed been assaulted on that occasion, the issue before them would be one of identity. Had the prosecution proved beyond reasonable doubt that it was the defendant who was the assailant? 5. The defendant, who is 28, has an extensive record of criminal convictions, of which the prosecution sought to introduce evidence of 6 in order to show that the defendant had a propensity for violence or threatened violence on the streets of St Helier, when he was accompanied by friends, against people with whom he had no personal relationship. The prosecution say that the fact that he was in the vicinity of the complainant supports the prosecution case that he was the assailant. 6. Before detailing the 6 convictions on which the prosecution sought to rely, it is helpful to set out the applicable law. The law 7. Article 82D of PPCE abolishes any rule of customary law governing the admissibility of evidence of bad character in criminal proceedings. 8. "Bad character" is defined in Article 82C as follows:- "82C Bad character References in this Part to evidence of a person's 'bad character' are to evidence of, or of a disposition towards, misconduct on his or her part, other than evidence which - (a) has to do with the alleged facts of the offence with which the defendant is charged; or (b) is evidence of misconduct in connection with the investigation or prosecution of that offence." 9. "Misconduct" is defined in Article 82A(1) as meaning "the commission of an offence or other reprehensible behaviour". 10. Under Article 82E(1), evidence of a defendant's bad character is admissible in criminal proceedings if, inter alia , it is admissible under any of the gateways set out in Articles 82F - 82I. Article 82E(2) provides that the Court must not admit evidence under Article 82F or Article 82G:- "....if, on an application by the defendant to exclude it, it appears to the court that the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it." 11. Article 82E(3) then provides:- "(3) On an application to exclude evidence under paragraph (2) the court must have regard, in particular, to the length of time between the matters to which that

evidence relates and the matters which form the subject of the offence charged." 12.

Article 82F(1) provides as follows:- "82F Matter in issue between the defendant and the prosecution (1) Subject to paragraph (2), evidence of a defendant's bad character is admissible if it is relevant to an important matter in issue between the defendant and the prosecution which includes - (a) The question whether the defendant has a propensity to commit offences of the kind with which he or she is charged, except where the defendant having such a propensity makes it no more likely that he or she is guilty of the offence; or (b) The question whether the defendant has a propensity to be untruthful, except where it is not suggested that the defendant's case is untruthful in any respect." In this case, the prosecution relied on Article 82F(1)(a), namely that the defendant had a propensity to commit an offence of this kind. 13. An "Important matter" is defined under Article 82A(1) as meaning "a matter of substantial importance in the context of the case as a whole" . 14. Article 82F(3) - (6) provide as follows:- "(3) Where paragraph (1)(a) applies, a defendant's propensity to commit offences of the kind with which he or she is charged may (without prejudice to any other way of doing so) be established by evidence that the defendant has been convicted of - (a) An offence of the same description as the one with which he or she is charged; or (b) An offence of a similar nature or type as the one with which he or she is charged. (4) Paragraph

- (3) does not apply in the case of a particular defendant if the court is satisfied that, by reason of the length of time since the conviction or for any other reason, it would be unjust for it to apply in his or her case. (5) For the purposes of paragraph (3)(a), 2 offences are of the same description as each other if the statement of the offence in a summons under Article 14 or 19 of the Criminal Procedure Law, or indictment under Article 43 of that Law, would, in each case, be in the same terms. (6) For the purposes of paragraph (3)(b), the States may, by Regulations, make provision as to what constitutes 2 offences as being of a similar nature or type as each other." No Regulations have been made for the purposes of paragraph (3)(b). 15. The English statutory equivalent to Article 82(F)(3), namely section 103(2) of the Criminal Justice Act 2003, provides as follows:- "103 Matter in issue between the defendant and the prosecution (1) (2) Where subsection (1)(a) applies, a defendant's propensity to commit offences of the kind with which he is charged may (without prejudice to any other way of doing so) be established by evidence that he has been convicted of - (a) An offence of the same description as the one with which he is charged, or (b) An offence of the same category as the one with which he is charged." (Difference emphasised) 16. The Secretary of State has produced categories of offences in the Criminal Justice Act 2003 (Categories of Offences) Order 2004 with categories of (i) Theft and (ii) Sexual Offences. Robbery is under the Theft Category. There is no category for non-sexual assaults. The wording of Article 82(F)(3)(b) is wider in that it refers to an offence "of a similar nature or type" as the one with which he or she is charged, but in any event, the opening paragraph of Article 82(F)(3) provides:- "Where paragraph 1(a) applies, a defendant's propensity to commit offences of the kind with which he or she is charged may (without prejudice to any other way of doing so) be established by evidence that the evidence has been convicted of ". (my emphasis)

17. As Archbold, 2019 edition states in sub paragraphs 13-46a:- "Elaborate as these are, in practice these provisions are relatively unimportant. First s.103(2) expressly states that they enable propensity to be shown 'without any prejudice to any other way of doing so.'"

Archbold continues:- "... so it is open to the prosecution to adduce as evidence of propensity a previous conviction for any offence of any type, whether or not s103(2) applies." 18. The emphasis in Article 82F(3)(b) is on the similar nature and type of offences. The fact that two separate categories exist indicates that previous convictions relied on do not have to be of the same description; they can differ in their description as long as they are of a similar nature or type. 19. The leading English case on the equivalent (but not identical) English statutory provisions, namely sections 101 - 103 of the Criminal Justice Act 2003, is the decision of the English Court of Appeal in *R v Hanson*

[2005] EWCA Crim 824 . Transposing the guidance given in that case to the relevant Articles of PPCE:- (i) Quoting from paragraph 4 of the judgment:- "The starting point should be for judges and practitioners to bear in mind that Parliament's purpose in the legislation was to assist in the evidence based conviction of the guilty, without putting those who are not guilty at risk of conviction by prejudice. It is accordingly to be hoped that prosecution applications to adduce such evidence will not be made routinely, simply because a defendant has previous convictions, but will be based on the particular circumstances of each case." (ii) There are three questions to be considered when considering propensity:- "(1) Does the history of conviction(s) establish a propensity to commit offences of the kind charged? (2) Does that propensity make it more likely that the defendant committed the offence charged? (3) Is it unjust to rely on the conviction(s) of the same description or [similar nature or type]; and, in any event, will the proceedings be unfair if they are admitted?" (Paragraph 7) 20. In referring to offences of the same description or of a similar nature or type Article 82F(3) is not exhaustive of the types of conviction which might be relied upon to show evidence of propensity to commit offences of the kind charged. Nor, however, is it necessarily sufficient in order to show such propensity that a conviction should be of the same description or similar nature or type as that charged. (Paragraph 8) 21. There is no minimum number of events necessary to establish propensity. A single previous conviction for an offence of the same description or similar nature or type will often not show propensity, but it may do so where it shows a tendency to unusual behaviour or where its circumstances demonstrate probative force in relation to the offence charged. Circumstances demonstrating probative force are not confined to those sharing striking similarity. If the *modus operandi* has significant features shared by the offence charged it may show propensity. (Paragraph 9) 22. When considering what is just under Article 82F(4) and the fairness of the proceedings under Article 82E(2), the judge may *inter alia* take into consideration the degree of similarity between the previous conviction and the offences charged. This does not however mean that what used to be referred to as striking similarity must be shown before convictions become admissible (Paragraph 10). 23. The judge may also take into consideration the gravity of the past and present offences. (Paragraph 10) 24. The Judge must always

consider the strength of the prosecution case. "If there is no or very little other evidence against a defendant, it is unlikely to be just to admit the previous convictions, whatever they are". (Paragraph 10) 25. If there is a substantial gap between the dates of the commission and conviction of offences, regard to the date of commission is generally more significant. (Paragraph 11) 26. Old convictions with no special feature shared with the offence charged, are likely seriously to affect the fairness of proceedings adversely, unless despite their age, it can properly be said that they show a continuing propensity. (Paragraph 11) 27. It will often be necessary, before determining admissibility and even when considering offences of the same description or similar nature or type, to examine each individual conviction rather than merely look to the name of the offence. (Paragraph 12) 28. The sentence passed will not normally be probative or admissible. (Paragraph 12) 29. Where past events are disputed the judge must take care not to permit the trial unreasonably to be diverted into an investigation of matters not charged on the indictment. (Paragraph 12) Previous convictions 30. I now set out the convictions which the prosecution seek to admit by reference to the date of commission, as opposed to the date of conviction. The facts of each of these convictions and their underlying circumstances are not in dispute, and so no issue arises as to their proof. Police National Computer ("PNC") No 17(2): Common assault 31. On 20 th December, 2006, the defendant, who was then aged 16, accompanied by friends whilst in town followed the victim shouting abuse at him and asking for a fight. The defendant pushed the victim to the ground and punched him to the face. PNC No 19(2): Grave and criminal assault 32. On 30 th May, 2007, the defendant, who was then aged 16, was apprehended by staff leaving Safeways in St Helier with a bottle of vodka hidden in his trousers. A struggle ensued in which he slung the bottle at the head of one of the members of staff, kicking her in the shin. It took three people to subdue him. PNC No 21(2) - (4): Three Common assaults 33. On 27 th October, 2007, whilst in town, the defendant, who was then aged 16, and a male friend (with females in attendance) asked victim 1 (who was unknown to him) for a cigarette. When victim 1 said he didn't have any, the other two victims were also asked if they had a cigarette. When they responded in the negative, the defendant and his friend became abusive and followed the victims, shouting abuse at them with the defendant punching or attempting to punch all three victims. PNC No 31(2): Grave and criminal assault 34. On 23 rd April, 2011, whilst at the Waterfront in St Helier, the defendant, who was then aged 20, with a co-defendant, committed an unprovoked grave and criminal assault on the victim by swinging a broken bottle at the victim, who broke the blow with his forearm, resulting in injuries to his arms. PNC No 32: Robbery 35. On 2 nd August, 2013, the defendant, who was then aged 22, was in town with friends and came upon the victims who were unknown to them. The victims were accosted by the defendant, who accused them of something (laughing at him), which they denied. The defendant then took the bottle from his co-defendant, threatened to use it as a weapon by smashing it upon the victims. The victims were told to empty their pockets and hand over items, which they did. PNC No 43: Common Assault 36. On 21 st October, 2018, the defendant, who was then aged 27, entered Morrison's in St Helier with a female friend and attempted

to leave without paying for a number of food items. When challenged, the defendant pushed a member of staff with both hands against her chest and ran away. The member of staff said that the push left reddening on her chest, but no injuries were sustained.

Submissions

37. The important matter in dispute in this case, assuming the jury accepted that the complainant had been assaulted by someone, was whether it was the defendant who was the assailant. It was an issue of identity. Advocate Hollywood submitted that all of these convictions were relevant to show propensity on the part of the defendant to commit the grave and criminal assault with which he is currently charged, in that they took place in St Helier, accompanied by friends or co-defendants, and involved victims with whom he had no personal relationship. That propensity made it more likely that the defendant committed the current offence. She made the following further points:- (i) The prosecution had a strong case with the complainant giving a consistent account, the evidence of his injuries, CCTV footage of the defendant in the reception of the hospital and in the vicinity (which he admits), the description given by the complainant of his assailant and his identification of the defendant at the Promat Video identification procedure. There was a further witness who saw someone very similar to the defendant changing his clothing in the vicinity of the alleged assault. The admission of bad character evidence would not, she said, bolster a weak case. (ii) Whilst old convictions with no special features would be likely to affect the fairness of the case (paragraph 11 of *R v Hanson*) there is no definition of what amounts to an old conviction and in *R v George Sully*

[2007] EWCA Crim 3512, the English Court of Appeal upheld a conviction for sexually assaulting a female at a trial in which two previous convictions of indecent assault by the appellant on young girls some 30 years before were admitted. The earlier convictions had a distinctive feature that was closely analogous to what had occurred. In *R v Murphy*

[2006] EWCA Crim 3408, the English Court of Appeal was concerned with the admission of one previous conviction some 20 years before and Keene LJ said this at paragraph 16:- "16 As Mr Saunders has stressed, it is the combination of only one previous conviction being relied upon to show propensity and the passage of time since that conviction which must cause concern. There may be cases where the factual circumstances of just one conviction, even as long ago as 20 years earlier, might be relevant to showing propensity, but we would expect such cases to be rare and to be ones where the earlier conviction showed some very special and distinctive feature, such as a predilection on the part of the defendant for a highly unusual form of sexual activity, or some arcane or highly specialised knowledge relevant to the present offence. In cases with less distinctive features in common, one would require some evidence of the propensity manifesting itself during the intervening period in order to render the earlier evidence admissible as evidence of a continuing propensity." (Keene LJ's emphasis) In this case, the convictions comprised offences of a similar nature which span a period from 2006 (when the

defendant was 16) to 2018 (when the defendant was 27), showing a clear propensity for violence of this kind on his part which continued on into his adulthood. (iii) The defendant was applying to exclude all of these convictions and so the provisions of Article 82E(2) and (3) applied. The Court was concerned, therefore, with the adverse effect on the fairness of the proceedings. In that respect, she referred to paragraph 26 of *R v Hanson* where the English Court of Appeal said this: "26 The admission of previous convictions was always likely to have an effect on the fairness of proceedings. But to accede to the defence submission to exclude the applicant's bad character would be tantamount to saying that if a defendant's record was bad enough it would always be excluded, whereas a defendant with one or two convictions was likely to have his bad character put before the jury." (iv) The Court of Appeal went on to say at paragraph 28: "28 It cannot generally be a sound objection to admissibility that the defendant has a very large number of previous convictions capable of showing propensity. This, as it seems to us, merely makes the evidence more compelling." (v) Large numbers of convictions can be admitted under this gateway provided they are relevant to a matter in issue and the judge has considered the potential unfairness. In *R v Blake*

[2006] EWCA Crim 871, the defendant was convicted of burglary and the English Court of Appeal held that the trial judge was correct to admit evidence that he had 15 previous convictions for burglary, which was properly admitted in order to show propensity. (vi) Fairness could also be ensured by the giving of appropriate judicial directions. Quoting from paragraph 18 of *R v Hanson* :- "18 Our final general observations is that, in any case in which evidence of bad character is admitted to show propensity, whether to commit offences or to be untruthful the judge in summing-up should warn the jury clearly against placing undue reliance on previous convictions. Evidence of bad character cannot be used simply to bolster a weak case, or to prejudice the minds of a jury against a defendant. In particular, the jury should be directed, that they should not conclude that the defendant is guilty or untruthful merely because he has these convictions. That, although the convictions may show a propensity, this does not mean that he has committed this offence or been untruthful in this case; that whether they in fact show a propensity is for them to decide; that they must take into account what the defendant has said about his previous convictions; and that, although they are entitled, if they find propensity as shown, to take this into account when determining guilt, propensity is only one relevant factor and they must assess its significance in the light of all the other evidence in the case. We do not purport to frame a specimen direction but the Judicial Studies Board may wish to consider these observations in relation to their helpful specimen direction No 24 on bad character." 38. Advocate Harrison, for the defendant, accepted that these criminal convictions were capable of establishing propensity on the part of the defendant to commit the offence charged and could make it more likely that the defendant committed the offence charged (the first two questions in *Hanson*), but submitted that it would be unjust and the proceedings would be unfair if they were admitted (the third question in *Hanson*):- (i) The circumstances of the assaults in stores, namely PNC No 19(2) and PNC No 43 were

very different. In the first, the defendant was on his own in the store and was suspected of shoplifting. He resorted to violence when it was sought to detain him. In the second incident, the defendant was in a store with a female companion and again was suspected of shoplifting. There was some question in discussion as to whether on this occasion the prosecution accepted a basis of plea put forward by the defendant that he had barged past the member of staff rather than push her. (ii) In terms of PNC No 32, the robbery, whilst Advocate Harrison accepted that it could be considered to be of a similar nature or type, the underlying facts were different. Crucially, the defendant only threatened to use a bottle as a weapon, but did not in fact use it. Issuing threats whilst armed with a bottle in order to steal does not demonstrate a propensity for actual violence with no underlying intent to steal. 39. In terms of the remaining convictions and their underlying facts, Advocate Harrison accepted that Article 82E(4) did not apply as the defendant was not under 15 when they were committed. Article 82E(4) is in these terms:- "In proceedings for an offence committed, or alleged to have been committed, by a defendant who has attained the age of 21, evidence of his or her conviction for an offence when under the age of 15 is not admissible unless the court is satisfied that the interests of justice require the evidence to be admissible." You either come within this provision or you do not. There is no "near miss" approach as the English Court of Appeal stated in *R v Clark*

[2014] EWCA Crim 1053 . 40. However Advocate Harrison submitted that, assuming PNC No 19(2), PNC No 32 and PNC No 43 were excluded, then the only relevant offences were committed by the defendant when he was a young offender (under 21 years of age) and there was no evidence that his propensity for unprovoked street violence had continued as an adult. The Court should also take into account the degree of similarity between these previous convictions and the offence charged. PNC Nos 17(2) and 21(2)

- (4) were common assaults that did not involve the use of a weapon and do not demonstrate a propensity to commit a serious assault using a weapon. Decision 41. As Advocate Harrison conceded, all of these previous convictions were admissible under the gateway provided by Article 82F(1)(a), in that they were convictions involving violence, capable of establishing propensity, but the issue was whether it was unjust to admit them having regard to the length of time since these convictions or for any other reason (Article 82F(4)) or whether their admission would have such an adverse effect on the fairness of the proceedings that the Court ought not to admit them, for which the Court should have regard, in particular, to the length of time between the commission of the earlier offences and the offence being charged (Article 82E(2) and (3)). 42. Both of these provisions require the Court to have regard, in particular, to the length of time between the commission of the earlier offences and the offence being charged, and I can see no discernible difference between the two tests. If it is unjust to admit them, then their admission would have an adverse effect on the fairness of the proceedings and vice versa . 43. I take first the two offences committed in stores, namely PNC No 19(2) and PNC No 43. Although these offences are offences of the same description as the current offence, I agreed with Advocate Harrison that they were committed in very different circumstances. These were not assaults committed on the

streets of St Helier against effective strangers, but were assaults committed while the defendant was being apprehended (in the first case on his own) for shoplifting. I also take into account the minor nature of the second offence - pushing or barging past a member of staff. In my view, it would be unjust and effect the fairness of the proceedings for these two convictions to be admitted as demonstrating propensity. 44. Advocate Hollywood contended that the facts of the current offending (grave and criminal assault) and the robbery under PNC No 32 fell within the same type of offence, in that they are offences of violence or threats of violence against a person. In support of this, she relied on the case of *R v Renda*

[2006] 1 WLR 2948, which, whilst under a different provision of the Criminal Justice Act (evidence adduced to create a false impression), it showed that robbery and assaults are treated as offences of violence under the Criminal Justice Act. In the case of PNC No 32, if the offence had simply been theft, it would not be of a similar nature or type; it is the element of violence that moves the robbery into being of similar nature or type offence as a grave and criminal assault. The *modus operandi* of the defendant supports, she said, the argument that the robbery conviction is an offence of a similar nature or type as the grave and criminal assault. 45. The robbery, PNC No 32, is not an offence of the same description as the current offence, but I agree with Advocate Hollywood that it is an offence of the same nature or type as the current offence, constituting as its heart unprovoked street violence, and is consistent with the defendant's *modus operandi*. Robbery is an offence of violence and demonstrates propensity. 46. As to the remaining convictions for assault and grave and criminal assault, namely PNC No 17(2), PNC No 21(2) - (4) and PNC No 31(2), they are all offences of the same description, with a degree of similarity in the defendant's *modus operandi* to make it just to admit them as demonstrating propensity. The fact that some assaults were committed without a weapon is not of significance. 47. I considered whether the three convictions committed whilst the defendant was under 21 should be treated differently for these purposes, but:- (i) Article 82E(4) makes it clear that it is offences committed whilst under the age of 15 that require special consideration, and (ii) I did not accept Advocate Harrison's submission that the defendant's propensity to unprovoked street attacks has not continued into adulthood. The evidence is to the contrary.

Conclusion

48. In conclusion, and addressing the three questions set out in *R v Hanson* :- (i) The history of the convictions PNC No 17(2), PNC No 21(2) - (4), PNC No 31(2) and PNC No 32 did establish a propensity on the part of the defendant to commit the current offence of grave and criminal assault. (ii) That propensity does make it more likely that the defendant committed the current offence of grave and criminal assault. (iii) It is not unjust to rely on these convictions and their admission will not render the proceedings unfair. 49. Counsel were requested that, as per *R v Hanson* at paragraph 17, the convictions should be admitted by way of written admission, and the jury would be given an appropriate direction. As it transpired, following the announcement of my decision the defendant changed his plea to guilty and the trial did

not take place. Authorities Police Procedures in Criminal Evidence (Jersey) Law 2003
Criminal Justice Act 2003 Archbold, 2019 edition R v Hanson

[2005] EWCA Crim 824 R v Sully [2007] EWCA Crim 3512 R v Murphy

[2006] EWCA Crim 3408 R v Blake [2006] EWCA Crim 871 R v Clark

[2014] EWCA Crim 1053 R v Renda

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