

JERSEY / JUDGMENT

AG v N [2024] JRC 251 (18 November 2024)

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JUDGMENT

THE COMMISSIONER: 1. A few days before the trial of the Defendant for two offences of domestic abuse was due to begin, I sat to consider the application of the prosecution to adduce certain hearsay evidence in circumstances where the Complainant would not be giving evidence. Following the hearing, I ruled that certain *res gestae* evidence should be admitted but that a subsequent witness statement by the Complainant should not be admitted. What follows constitutes my reasons for those decisions. Factual background 2. At the time of the hearing before me, the Defendant was charged with two offences of domestic abuse. Count 1 was said to have occurred on 9 May 2024 and count 2 on 10 May 2024. Following my decision, the prosecution sought and were granted leave to amend the indictment by substituting a charge of common assault as count 1 in place of the original charge of domestic abuse, but nothing turns on that. The prosecution case 3. The Defendant and the Complainant had been in a relationship and had lived together since a date in 2023. At the time of the alleged offences, the Complainant was pregnant with the Defendant's child and there is medical evidence that this is a high risk pregnancy. There was an altercation between the parties on 9 May which is the subject of count 1. 4. Following that incident, the next day, the Complainant said to the Defendant that she did not wish him to come back to the house and he agreed he would stay at friends. However, at about 11pm that night, the Defendant came back to the house, at which point the Complainant was asleep. A verbal argument then began and this turned into a physical altercation. At a couple of points, the Complainant recorded what was happening on a video on her mobile phone. The prosecution case is that the Defendant committed four acts of abusive behaviour on 10 May, each of which constituted an offence of assault under Jersey law, namely (i) attempting to slam a door on the Complainant; (ii) punching the Complainant to the face; (iii) pulling the Complainant to the floor and kicking her; (iv) grabbing and holding the Complainant by the neck. The last two acts took place in the lounge following which the Defendant went into the bedroom. At this point the Complainant made a 999 call to the police. During the course of that call she said that she had been assaulted by her boyfriend and she gave certain details as to the nature of the violence he had used towards her. She was clearly distressed during the call. 5. The police were sent to the address as a result of the call and arrived whilst the Complainant was still speaking to the police control room on the 999 call. PC Bastable and PC Welsby entered the accommodation and activated their body worn cameras. Their footage recorded certain statements by the Complainant about how the Defendant had assaulted her and also showed the Complainant in a

distressed state. The Defendant was still in the bedroom when the police arrived and was subsequently arrested. 6. The Complainant and the Defendant were subsequently examined by the force medical examiner and both were found to have injuries. The Defendant was subsequently interviewed. He denied certain of the alleged acts and said that the rest had been carried out in self-defence as it was the Complainant who was attacking him, following which there was a struggle. The Complainant's position 7. The Complainant provided a witness statement on 11 May giving a full description of what she said the Defendant had done. Ten days later she provided a further statement in which she said that she no longer wished to support a prosecution and wished to retract her original statement, although she confirmed that the contents of that statement were true and accurate. She explained in the further statement that she did not want any animosity with the Defendant once the baby was born. She said she would like him to be part of the child's life as she knew he was a good parent. She was finding the whole process mentally and emotionally draining and did not want the additional stress which the court process carried. 8. At that point, the prosecution decided to give the Complainant time to see if she changed her mind. On 21 August, having spoken to her again, the police emailed the prosecution to say that the Complainant still did not wish to give evidence in court and was suffering considerable stress at the thought. On 5 September, Dr Ruddy, the consultant psychiatrist involved in the Complainant's care, wrote to express concern about the effect which the stress of being a witness was having on the Complainant's mental health and pregnancy. He asked if it would be possible for her to give pre-recorded evidence in order to relieve the stress. Following this, DC Thomas of the public protection unit had a further conversation with the Complainant and she provided a witness statement in connection with that conversation. She said that the Complainant was not happy that Dr Ruddy had suggested she could give pre-recorded evidence as she was clear that she did not want to give any evidence. She said that she did not wish to give evidence via a pre-recorded video interview or via live video link. She did not want to be involved at all which was why she had retracted her original statement. She was not scared but she did not want to be blamed if the Defendant went to jail. She did not wish to be responsible for him not seeing his own children and their child. She said it would massively affect his future and she did not want to have anything to do with it. Not going to court at all would massively reduce her anxiety and assist with improving her current poor mental health. 9. The prosecution have considered whether to summons the Complainant to give evidence. However, given the evidence of the Complainant's state of mental health and the possible effect on her pregnancy (which is already considered to be high risk) they have decided that it would not be right to insist on the Complainant giving oral evidence. 10. It is against that background that the prosecution made the application for the Complainant's evidence to be admitted as hearsay. The hearsay evidence 11. The prosecution applied to admit the following hearsay evidence: (i) The statements by the Complainant in the body worn camera footage of PC Bastable; (ii) The statements by the Complainant in the body worn camera footage of PC Welsby; (iii) The 999 call made by the Complainant; and (iv) The witness statement of the Complainant dated 11 May 2024. The statutory provisions 12. The admissibility of hearsay evidence is dealt with in Part 8 of the Police Procedures and Civil Evidence (Jersey) Law 2003 ("the Law"). The relevant provisions for present purposes are as follows: "64 Admissibility of statement not made in oral

evidence (1) In criminal proceedings a statement not made in oral evidence in the proceedings is admissible as evidence of any matter stated if, but only if: (a) any provision of this Part or another provision of an enactment makes it admissible; (b) any rule of customary law referred to in Article 64A makes it admissible; (c) all parties to the proceedings agree to it being admissible; or (d) the court is satisfied that it is in the interests of justice for it to be admissible... 64A

Admissibility of statement under rules of customary law For the purposes of Article 64(1)(b), any rule of customary law in respect of the following (a) .. (b) *res gestae*.... Cases where a witness is unavailable (1) In criminal proceedings a statement not made in oral evidence in the proceedings is admissible as evidence of any matter stated if: ...

(c) any condition listed in paragraph (2) is satisfied. (2) The conditions are...

(b) the relevant person is unfit to be a witness because of his or her bodily or mental condition...." 13. In her skeleton argument, Crown Advocate Hall submitted that all four categories of hearsay evidence sought to be admitted were admissible under Article 65(2)(b), namely that the Complainant was "unfit" to be a witness. In oral argument, she accepted that the evidence on this aspect was not strong but did not abandon the submission. 14. In my judgment, there is insufficient evidence to show that the Complainant is unfit to be a witness. Dr Ruddy does not say so in specific terms; he says merely that he is concerned about the stress and asks if the Complainant could give evidence by pre-recorded evidence rather than by giving direct evidence in court. It is important that Article 65(2)(b) should not be diluted simply to cover cases where a witness will, quite naturally, be stressed or anxious about giving evidence. The statute is specific in using the word "unfit". As Archbold (2022 edition) states at 11-19: "A statement from a doctor that it would be in the best interests of the witness if she were able to submit written evidence was hardly equivalent to proof that she was unfit to attend because of her mental condition; whilst pointing in that direction, it was not sufficient; the provision in question is important as it is necessary that statements of witnesses who are indeed unfit should be able to be given, but it is equally important that there is proper protection against the admission of such statements unless the relevant conditions are indeed satisfied." 15. Accordingly, if the hearsay evidence is to be admitted, the prosecution must bring it within one of the other gateways available under the Law. *Res gestae* 16. Crown Advocate Hall submitted that what the Complainant said about the incident on 10 May as recorded in the body worn camera footage of the police officers ("the footage") and the 999 call are admissible under Article 64(1)(b) (read with Article 64A(b)) as *res gestae*. She accepts, correctly, that the witness statement is not *res gestae* and is therefore not admissible under this gateway. 17. Advocate Blakeley does not dispute that the 999 call and the footage constitute *res gestae* but submits that they should be excluded under Article 76 of the Law on the ground that the admission of the evidence would so adversely affect the fairness of the proceedings that the court ought not to admit it. 18. Despite the common ground that this evidence constitutes *res gestae*, it is helpful to remind oneself why such evidence is admissible, as the reasons for allowing such evidence as an exception to the hearsay rule may be relevant when one considers whether, as a matter of discretion, it ought nevertheless to be excluded under Article 76. 19. The position as to *res gestae* in Jersey

was summarised in *AG v McKeegan*

[2018] JRC 063 in the following terms at [18]-[20]: "18. In *Shewan v AG*

[2006] JLR 79 the Court of Appeal held that the law of Jersey in relation to *res gestae* is similar to English law and is derived from the principles set out in *Ratten v R*

[1972] AC 378 and *R v Andrews*

[1987] AC 281. In *Ratten*, Lord Wilberforce confirmed that a hearsay statement made by the victim of an attack or by a bystander was admissible if it was part of the *res gestae*. He then went on to explain what this meant and concluded at 391 that the authorities:- "...show that there is ample support for the principle that hearsay evidence may be admitted if the statement providing it is made in such conditions (always being those of approximate but not exact contemporaneity) of involvement or pressure as to exclude the possibility of concoction or distortion to the advantage of the maker or the disadvantage of the accused." 19. Earlier, at 388, he had said this:- "The possibility of concoction, or fabrication, where it exists, is on the other hand an entirely valid reason for exclusion, and is probably the real test which judges in fact apply. In their Lordship's opinion this should be recognised and applied directly as the relevance test: the test should be not the uncertain one whether the making of the statement was in some sense part of the event or transaction. This may often be difficult to establish: such external matters as the time which elapses between the events and the speaking of the words (or vice versa), and the differences in location being relevant factors but not, taken by themselves, decisive criteria. As regards statements made after the event it must be for the judge, by preliminary ruling, to satisfy himself that the statement was so clearly made in circumstances of spontaneity or involvement in the event that the possibility of concoction can be disregarded. Conversely, if he considers that the statement was made by way of narrative of a detached prior event so that the speaker was so disengaged from it as to be able to construct or adapt his account, he should exclude it." 20. The position was authoritatively summarised by Lord Ackner in *Andrews* where he said this at 300:- "My Lords, may I therefore summarise the position which confronts the trial judge when faced in a criminal case with an application under the *res gestae* doctrine to admit evidence of statements, with a view to establishing the truth of some fact thus narrated, such evidence being truly categorised as 'hearsay evidence':- 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. Thus the judge must be satisfied that the event, which provided the trigger mechanism for the statement, was still operative. The fact that the statement was made in answer to a question is but one factor to consider under this heading. 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. However, here again there may be special features that may give rise to the possibility of error. In the instant case there was evidence that the deceased had drunk to excess, well over double the permitted limit for driving a motor car. Another example would be where the identification was made in circumstances of particular difficulty or where the declarant suffered from defective eyesight. In such circumstances the trial judge must consider whether he can exclude the possibility of error." 20. I have no hesitation in concluding that both the 999 call and the comments made by the Complainant in the footage are admissible as *res gestae*. They were made in circumstances where the events in question were dominating the thoughts of the Complainant so that what she said was an instinctive reaction, with no real opportunity for reasoned reflection and therefore concoction or distortion. 21. The 999 call was made immediately upon the Defendant leaving the lounge after the alleged incident and going to the bedroom. It was therefore made moments after the alleged abusive behaviour in circumstances where the Complainant was still clearly very distressed. Similarly, the footage was taken when the thoughts and emotions of the Complainant were still dominated by what had just happened. The police arrived whilst the Complainant was still on the 999 call and accordingly there was no delay. It is clear from the footage that she was still very distressed. 22. Having held that what the Complainant said in the 999 call and the footage forms part of the *res gestae*, it follows that this evidence is admissible; see *R v W* (Attorney General's reference No 1 of 2003,

[2003] EWCA Crim 1286 at [18] and [21]). The question then is whether such evidence should nevertheless be excluded under Article 76 because the Complainant will not be giving oral evidence and will therefore not be available for cross-examination. In this respect I was referred to a number of cases. 23. In *Wills v Crown Prosecution Service*

[2016] EWHC 3779 (Admin), the defendants were convicted of assault before the magistrates and appealed to the Divisional Court by way of case stated on the ground that certain *res gestae* evidence, consisting of statements made by the complainant to a neighbour immediately after the assault and to the police on their arrival following a 999 call made from the neighbour's house, had been wrongly admitted in the absence of the complainant to give evidence. 24. The circumstances in which this arose were that, on the

day of the trial before the magistrates, the complainant did not appear. The prosecution were not aware that she would not be present and were unable to explain her absence. After an adjournment of an hour to see if she arrived, the magistrates decided to proceed in her absence and allowed the prosecution's application to adduce the *res gestae* evidence referred to above in the absence of the complainant. 25. In its judgment, the Divisional Court was highly critical of the fact that no enquiries were made as to why the complainant had not appeared. The court considered that it was unfair to admit *res gestae* evidence in the absence of the complainant without there being a full explanation of why the complainant was not present, so that the court could take this into account when deciding whether to admit the *res gestae* evidence in the complainant's absence. In the circumstances, the Divisional Court quashed the conviction. 26. It is clear that the decision in *Wills* established an important principle which has been referred to in subsequent cases, namely that before any *res gestae* evidence is to be admitted in the absence of the complainant, the prosecution must make full enquiries and do what they can to get the complainant to give evidence. The court needs to be made aware of these matters when deciding whether to exclude the *res gestae* evidence in the absence of the complainant. 27. Accepting fully the principle established in *Wills*, I do not consider it to be relevant in the present case. The material placed before me, including the witness statement from PC Thomas, explains exactly what efforts have been made to persuade the Complainant to participate in the criminal proceedings and why she is not willing to do so. I therefore have the necessary information to allow me to decide whether the *res gestae* evidence in this case should be excluded. 28. In *DPP v Barton*

[2024] 2 Cr App R 15, the complainant made a 999 call to the police stating that she had been assaulted by the defendant, who was her husband. The police arrived about 25 minutes later and there was body worn camera footage of statements by the complainant about how her husband had assaulted her. However, the complainant was unwilling to provide a witness statement and later sent a letter to the police saying that she had been drinking on the night in question and that she no longer thought she had been assaulted. She did not support a prosecution and had said from the outset that she did not. The court held at [11] that the court below had been "plainly correct" to find that the 999 call and the complainant's words as recorded on the body worn video footage in which she stated her husband had assaulted her, were admissible as *res gestae*. 29. At the trial before the district judge, although the complainant was present, the prosecution said that they were not willing to call her as it was concerned that, although this was not a case where she was in fear, she would not give a truthful account. The judge then struck out the prosecution as an abuse of process on the ground that the defendant could not have a fair trial if the prosecution did not call the complainant to give evidence. The prosecution appealed that decision to the Divisional Court by way of case stated. 30. The main part of the appeal was concerned with whether the district judge had been entitled to stay the prosecution as an abuse of process. On this aspect, the Divisional Court held that the prosecution had acted perfectly reasonably in not calling a witness whom they thought would be untruthful and

that the judge was wrong to stay the proceedings on the ground that the defendant could not have a fair trial. It would have been open to the defendant to call the complainant, who was expected to give evidence in favour of the defendant, or for the judge himself to call the complainant so as to allow cross-examination by both sides. 31. For present purposes, the relevant part of the judgment is where the court considered obiter whether, if the judge had not stopped the trial, he would have been bound to exclude the *res gestae* evidence under the equivalent of Article 76 of the Law. The defendant, through his counsel, Mr Csoka, submitted that the case law established a general principle that, apart from a case where a complainant is in fear of attending court to give evidence, a defendant will not receive a fair trial where the prosecution is relying on the complainant's *res gestae* evidence, unless the prosecution either calls or tenders the witness to give evidence. 32. Dame Victoria Sharp P, giving the judgment of the court, rejected this submission. She said as follows at [64]-[66]: "64. In the sensitive and specific context of domestic abuse, the position, in our opinion, is very different from that advocated for by Mr Csoka. It is that it will often not be unfair to allow the prosecution to adduce the *res gestae* evidence of a complainant where they are not called as a witness, and there is an absence of fear. As is now well understood, it is not uncommon in such cases for there to be sufficient evidence to prosecute the alleged perpetrator of the abuse even where the complainant does not support the prosecution. In our opinion, in such cases the public interest may often demand the use of *res gestae* evidence, particularly recorded evidence, regardless of the cooperation of the complainant. 65. As the Court of Appeal observed in *R v C*

[2007] EWCA Crim 3463 at [12]: "...an alleged victim of domestic violence is in a peculiarly unhappy position, namely of being required to give evidence against someone with whom perhaps she is still living but certainly for whom she still has feelings of affection. She is unlikely therefore to want to make matters worse for him, still less to have to do so in a public place. To require her, if that is her attitude and if she has made clear that she does not want to support the prosecution publicly, to go into the witness-box and be cross-examined by the prosecution in that way may, in certain circumstances, only exacerbate the wretched situation in which she finds herself."

66. At [14], the Court of Appeal considered how the prosecution could deal with this common situation. It explained that it could seek to adduce that evidence which properly fell within the *res gestae* exception, together with any direct evidence, such as police body-worn footage, that tended to support the veracity or accuracy of the hearsay evidence, without any need to rely on the complainant's testimony....." The court concluded by saying that it would clearly have been open to the judge not to exclude the *res gestae* evidence. 33. In *Vilhete v Crown Prosecution Service*

[2024] EWHC 2171 (Admin) , the defendant was convicted before the magistrates' court of assaulting his ex-partner. He appealed to the Crown Court which dismissed that appeal. He then appealed to the High Court by way of case stated. 34. The prosecution case was

that the defendant had attended at the complainant's home where, during the course of an argument, he had punched the complainant in the face several times causing injury. The defendant had left whereupon the complainant made a 999 call to the police during which she said had been assaulted by her ex-partner some five minutes earlier. She was distressed during the call. The police arrived shortly after the 999 call ended. Body worn camera footage recorded the complainant, still in some distress, stating that the defendant had assaulted her some ten to fifteen minutes earlier. Having initially provided a witness statement, the complainant provided a further statement a few weeks later withdrawing her support for a prosecution. She felt that the defendant needed help for his mental health and did not think the matter should be taken to court. She maintained this stance through to trial. 35. Before the magistrates and the Crown Court, the *res gestae* evidence consisting of the 999 call and the complainant's account recorded in the body worn camera footage was ruled to be admissible as *res gestae* and the Crown Court explained why it did not exclude that evidence under the equivalent of Article 76 on the ground of unfairness. 36. On appeal to the High Court, Mould J noted that there was a statement from the officer in charge explaining to the Crown Court the efforts which had been made to persuade the complainant to give evidence and why she was not willing to do so. The judge also referred to what had been said in *R v C and Barton* in the passages quoted at para 32 above. The judge rejected the submission on behalf of the defendant that the hearsay evidence should have been excluded because of the inability to cross-examine the complainant and upheld the conviction. 37. In my judgment, these cases show that it is not the case that *res gestae* evidence will necessarily be excluded if the complainant does not attend to give oral evidence; nor is it the case that such evidence should invariably be admitted in such circumstances. The court must consider the facts of the individual case and decide whether admitting the evidence would so adversely affect the fairness of the trial that it ought not to be admitted. 38. Advocate Blakeley submitted forcefully that it would indeed be unfair in this case. The defence would have no opportunity to test what the Complainant had said in the 999 call or the footage. 39. I accept that this is so but in my judgment, in the circumstances of this case, the admission of the evidence would not so adversely affect the fairness of the proceedings that I ought to exclude it. I would summarise my reasons for having reached this conclusion as follows: (i) As stated in *R v C* at [12] and *DPP v Barton* at [64], it is not uncommon for this issue to arise in the context of alleged domestic abuse and the courts have concluded that it will often not be unfair to allow *res gestae* evidence to be admitted. (ii) I bear in mind that what I am considering at this point is *res gestae* evidence. The whole thinking behind the exception to the hearsay rule in relation to such evidence is that what the witness has said is an instinctive reaction to the event in question without any real opportunity for reasoned reflection. (iii) Although the evidence of the Complainant will undoubtedly be of the first importance, it is not the only evidence in the case. Thus, apart from the *res gestae* evidence, there are the injuries to the Complainant, the contemporaneous recording made by her on her phone of parts of the incident and her distress during the 999 call and the footage. (iv) I accept that the inability for the defence to cross-examine the Complainant is a serious

disadvantage for the Defendant but he has given a full version of his case in the police interview and he will be able to give evidence at the trial if he so wishes. Importantly, any prejudice to him can be ameliorated by a firm direction to the Jurats that they need to take into account in his favour the limitations in the evidence as a result of the Complainant's absence, namely (i) the *res gestae* evidence is not given on oath, (ii) they will not have the opportunity of witnessing her demeanour when giving evidence which is often important when assessing whether a witness is telling the truth or not; and (iii) they will not have seen her evidence tested by cross-examination. 40. Putting all these matters together I ruled that the *res gestae* evidence should not be excluded under Article 76. I did however give directions about editing the footage so as to ensure that it only contained the admissible *res gestae* evidence together with evidence of the Complainant's distress. The Complainant's witness statement 41. As already stated, it is correctly common ground that the witness statement is not admissible as *res gestae*. Following my decision that the statement is not admissible under Article 65(2)(b) (because the Complainant is not unfit to give evidence), the only remaining possible gateway for the admission of the witness statement is Article 64(1)(d), namely that it is in the interests of justice for the statement to be admitted. In this connection, Article 64(2) provides as follows: "(2) In deciding whether a statement not made in oral evidence should be admitted under paragraph (1)(d), the court must have regard to the following factors (and to any others it considers relevant) -

- (a) How much probative value the statement has (assuming it to be true) in relation to a matter in issue in the proceedings, or how valuable it is for the understanding of other evidence in the case;
- (b) What other evidence has been, or can be, given on the matter or evidence mentioned in sub-paragraph (a);
- (c) How important the matter or evidence mentioned in sub-paragraph (a) is in the context of the case as a whole;
- (d) The circumstances in which the statement was made;
- (e) How reliable the maker of the statement appears to be;
- (f) How reliable the evidence of the making of the statement appears to be;
- (g) Whether oral evidence of the matter stated can be given and, if not, why it cannot;
- (h) The amount of difficulty involved in challenging the statement; and
- (i) The extent to which that difficulty would be likely to prejudice the party facing it." 42. Advocate Blakeley submits that the prejudice to the Defendant by not being able to cross-examine the Complainant is even greater in relation to the witness statement, which contains in detailed narrative form the Complainant's version of events. 43. He referred in support to the case of *McEwan v DPP*

- [2007] EWHC 740 (Admin). In that case, the defendant was charged with criminal damage. There had been considerable delay and a number of adjournments which were all attributable to the prosecution. On the day of the adjourned trial, the prosecution applied for a further adjournment on the ground of the absence of two witnesses but this was refused. The prosecution then applied for, and was granted by the magistrates, leave for the witness statement of one of the absent witnesses, C, to be adduced under section 114(1)(d), the equivalent of Article 94(1)(d). The defendant was convicted. On appeal to the Divisional Court by way of case stated, it was argued that C's witness statement should not have been admitted. 44. It is clear from the judgment that the court was singularly unimpressed with the prosecution's conduct of the proceedings which it said painted a "lamentable picture". The court said at [18] that the "safety valve" of the interests of justice gateway was there to prevent injustice. It would have to be an exceptional case for it to be relied upon, as in that case, to rescue the prosecution from the consequences of its own failures. The court held that the witness statement of C had been wrongly admitted and quashed the conviction. 45. I was not referred to any other cases on this topic by counsel, but two cases referred to in Archbold at 11-3(e) are, in my view, of assistance. In *Z v R*
- [2009] EWCA Crim 20, the defendant was charged with historic offences of rape. The prosecution wished to adduce bad character evidence, namely that the defendant had also raped a woman 'D' some years ago. D was unwilling to give evidence and accordingly the prosecution sought permission under section 114(1)(d) to adduce hearsay evidence from a doctor and a police officer of what D had said to them about being raped by the defendant. 46. The English Court of Appeal held that the judge had been wrong to admit this hearsay evidence. Burnton LJ, giving the judgment of the court, said this at [20]: "In our judgment, section 114(1)(d) is to be cautiously applied, since otherwise the conditions laid down by Parliament in section 116 [the equivalent of Article 65 of the Law] would be circumvented. As Scott Baker LJ said in *O'Hare*
- [2006] EWCA Crim 2512 at paragraph 30: "We think it important to point out that, as a matter of generality, section 114 cannot and should not be applied so as to render section 116 nugatory." But section 114(1)(d) should not be so narrowly applied that it has no effect. It follows that there will be cases in which hearsay evidence may be admitted under it in circumstances in which it could not be admitted under section 116...." 47. Burnton LJ then referred to the observation of Hughes LJ in *R v Y*
- [2008] EWCA Crim 10 at [56] where he said: "...the Judge must stand back and ask whether it is in the interests of justice that the statement be admitted. In doing so, he will of course remember that the statute does not render hearsay automatically admissible, and the reasons why it is not. Put broadly, they are that hearsay is necessarily second best evidence, and that it is for that reason much more difficult to test and to assess. The jury never sees the person whose word is being relied upon. That person cannot be asked a single exploratory or challenging question about what he said. Those very real disadvantages of hearsay evidence, which underlay the common law rule generally

excluding it, remain critical to the assessment of whether the interests of justice call for its admission..." 48. Burnton LJ explained the reasons for the Court of Appeal's decision in the following terms at [24]: "If the judge had considered the matters listed in section 114(2) [the equivalent of Article 64(2) of the Law quoted at para 41 above] he would have had to consider in particular paragraphs (a), (g), (h) and (i). As to (a), this evidence was of very considerable importance; if accepted by the jury, it would undermine the defence and point powerfully to a conviction. This made the other factors even more significant, and in particular little (g). It is important to note that paragraph (g) refers to the inability of the witness to give evidence, not her reluctance or unwillingness, understandable though her attitude may be. That is consistent with the restrictions in section 116. Cases must be rare indeed in which such significant potentially prejudicial evidence as that of D should be admitted as hearsay where the maker of the statement is alive and well and able, although reluctant, to testify, and her reluctance is not due to fear (i.e. the condition in section 116(2)(e) is not satisfied)." 49. To like effect is the decision of the English Court of Appeal in *EED v R*

[2010] EWCA Crim 1213 . This was also a case of historic sexual offences. There were a number of complainants including LT. They all gave evidence. The prosecution wished to adduce evidence from a witness ML, whom LT had told at the time about being indecently assaulted by the defendant. ML gave a witness statement outlining what she had been told by LT at the time but was not willing to give evidence at trial. The prosecution applied for and were granted leave to adduce the witness statement of ML under section 114(1)(d) as being in the interests of justice. 50. The Court of Appeal held that the statement should not have been admitted and that the interests of justice were better served by the exclusion of the evidence. In passing, Pickford LJ said at [17]: "17. This decision [*Z v R*] is important because it reinforces the court's view that it should not countenance the use of section 114(1)(d) to circumvent the requirements of other gateways to admissibility higher up the section 114(1) hierarchy. It is not permissible to nod through hearsay evidence merely because it is convenient to the party seeking its admission and the evidence is of value upon an important issue in the trial. We note, however, that neither the court in *Z*, nor the court on any other occasion brought to our attention, has ruled that in no circumstances will hearsay evidence be excluded (sic) [admitted?] on this ground when otherwise there would be cogent reasons for admitting the evidence in the interests of justice. On the contrary, the terms of section 114(2)(g) read in context with the other paragraphs of section 114(2) suggest that it is contemplated that there maybe occasions when evidence, which cannot be given orally for reasons other than those provided for by section 116, may be admitted.... 21. Each of these decisions demonstrates, in our view, how limited are the circumstances in which the evidence of an available but reluctant witness may be admitted in the interests of justice.... it is our common law tradition that the defendant is entitled to examine the witnesses against him and only in strictly circumscribed circumstances will a hearsay statement be admitted in the interests of justice. The trial judge is the gatekeeper responsible for the fairness of the trial...and the examination of

the factors set out in section 114(2) and any other relevant factors must be performed with caution when the object is to fill a gap caused by the non-attendance of a live witness on grounds which do not fall within section 116." 51. I have carefully considered the factors listed in Article 64(2) and, in my judgment, it would not be in the interests of justice to admit the Complainant's witness statement in circumstances where she is not willing to give evidence at trial; on the contrary, I consider it would lead to an unfair trial. 52. It is understandable why *res gestae* is a specific exception in the Law and at common law to the general prohibition on hearsay evidence. It is for the reasons set out by Lord Wilberforce and Lord Ackner in the passages from Ratten and Andrews quoted above, namely that the pressure of the event is dominating the thoughts of the witness such is that the possibility of concoction or distortion can be excluded. 53. That is not so in relation to a witness statement made in the calming presence of police officers who will be asking questions in order to obtain the narrative story. As Lord Wilberforce put it in the passage quoted above at para 19, a witness statement is usually made "by way of narrative of a detached prior event so that the speaker [is] so disengaged from it as to be able to construct or adapt his account". 54. In these circumstances, it is all the more important that a defendant has the ability to challenge the evidence contained in a witness statement by way of cross-examination of the complainant. This is not only to establish how well the evidence in the witness statement stands up to scrutiny, but also to enable the court to assess the demeanour of the complainant as she deals with the questions put by way of challenge. 55. Despite the importance which the courts attach to assisting possible victims of domestic abuse as described in the passages quoted above in *R v C* and *Barton v DPP*, all the cases to which I was referred were dealing with *res gestae* evidence, with all the inherent protections and probabilities referred to in Ratten and Andrews. The observations by the courts quoted above about it not necessarily being unfair to admit *res gestae* evidence in the absence of the relevant witness giving evidence are all dealing with *res gestae* evidence. 56. Crown Advocate Hall was unable to refer me to a case where a decision to admit the witness statement of a complainant in relation to a sexual or domestic abuse offence under the interests of justice gateway (as opposed to one of the specific gateways such as death, unfitness etc) has been upheld. It seems to me that if I were to admit the statement in the present case, it is hard to see why such a statement should not be routinely admitted when a complainant is not willing to give evidence. That would not, in my view, be consistent with Art. 6 ECHR or in the interests of justice. It would indeed be to use Article 64(1)(d) to circumvent the carefully crafted specific exceptions in Article 65. 57. I emphasise there is no suggestion in this case that the Complainant has been put under any form of pressure by the Defendant not to give evidence against him. If there were evidence of a complainant being pressurised or influenced by a defendant to refuse to give evidence (even if this did not amount to the complainant being put "in fear" for the purposes of the specific gateway in Article 65(2)(e) of the Law), a court might well reach a very different conclusion as to the fairness of the witness statement being admitted in the interests of justice. 58. However, in the present case, I conclude that the inability of the defence to cross-examine the Complainant in circumstances where her witness statement

would constitute the main (albeit not exclusive) evidence against him would lead to an unfair trial. I therefore declined to admit it in the interests of justice under Article 64(1)(d). 59. On a point of detail, I should add that the footage of one of the police officers contained comments by the Complainant about the events of 9 May. Such comments were clearly not res gestae given that they were made some 24 hours after the incident of 9 May. I therefore considered the admissibility of those comments under Article 64(1)(d). For the same reasons as in relation to the witness statement, I declined to admit them under that gateway. They were therefore not in the footage which was subsequently shown to the Jurats. Postscript 60. Following a trial in which the res gestae evidence referred to above was admitted but the Complainant did not give oral evidence, the Jurats unanimously found the Defendant not guilty on both counts. Authorities Police Procedures and Civil Evidence (Jersey) Law 2003. Archbold Criminal Pleading, Evidence and Practice 2023. AG v McKeegan

[2018] JRC 063 . R v W (Attorney General's reference No 1 of 2003,

[2003] EWCA Crim 1286 . Wills v Crown Prosecution Service

[2016] EWHC 3779 (Admin). DPP v Barton [2024] 2 Cr App R 15 Vilhete v Crown Prosecution Service

[2024] EWHC 2171 . McEwan v DPP [2007] EWHC 740 (Admin). Z v R

[2009] EWCA Crim 20 . R v Y

[2008] EWCA Crim 10 . EED v R

[2010] EWCA Crim 1213 . Page Last Updated: 28 Nov 2024 Back to top About JLIB Accessibility
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