

JERSEY / JUDGMENT

AG -v- R [2017] JRC 173 (19 October 2017)

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JUDGMENT

THE commissioner: 1. This is an application by the defence to exclude certain evidence that the Crown intend adducing in the prosecution against the defendant for four counts of indecent assault against the same complainant, who was 9 at the time. Under Counts 1 and 2, he is alleged to have kissed her on her mouth, under Count 3 he is alleged to have held her from behind and rubbed his body against her and under Count 4 he is alleged to have touched the inside of her leg and thigh. 2. The complainant and the defendant's son were good friends, and played together frequently, often in the defendant's house and garden. 3. The complainant disclosed to her mother that the defendant had kissed her twice on the lips, describing the second kiss as "a married kiss". 4. The defendant was interviewed twice by the police, and painted a picture of the complainant as a child who was starved of affection and who was over physically affectionate towards him. She had imaginary friends and didn't always tell the truth a lot of the time. He treated her as if she were his own child, something his wife was uncomfortable with. He admitted kissing her on the lips (Counts 1 and 2), but said it was a threat he had made to get her out of the house. It was she who kissed him; something he wasn't expecting. He got no pleasure or sexual gratification from it. He denied ever being attracted towards children. 5. The indecent assault under Count 3 allegedly took place when the defendant was washing his car, and was witnessed by a neighbour. The neighbour saw the defendant washing his car with the complainant by his side following him around. At one point, the defendant gave the complainant the washer gun and she started to wash the car. The neighbour saw the defendant moving behind the complainant as if he was showing her how to use the washer. He was very close behind her, his arms around her and holding the washer gun. He could see the defendant's body touching the complainant's and they were in a very tight hold, which lasted a few minutes. The defendant moved with the complainant around the car, holding her in the same tight position, like a dance. The neighbour said it looked as if the defendant was rubbing against the complainant, and thought he was doing this for his own sexual gratification. 6. The defendant admitted to the police washing his car with the complainant and helping her with the power washer. He said he might have picked her up to wash the top half of the car, and may have been more physical with her than he would have been with any other child, apart from his own son and the complainant whom he treated like his child, but the neighbour had misconstrued what he saw. 7. The allegation of indecent assault under Count 4 took place first chronologically. A neighbour saw the complainant and the defendant in the common driveway. They had their backs to her. It was a

warm day, and the neighbour noted that the complainant was wearing a dress with her bare skin. She said she saw the defendant kneel down next to the complainant and, with his left hand, rub down her back from the middle of her back. She did not think there was anything initially strange about that, but he continued to stroke his hand down into the small of her back and down on to her right leg. His hand then went down her calf and came back on the inside of her leg and stopped midway up the inside of her thigh. The neighbour said she was shocked and frozen and felt sick at what she had seen. 8. The defendant could not remember this incident. He said he might have touched the complainant on the back, but didn't recall putting his hand up the complainant's leg. He questioned the angle the neighbour was looking from, and suggested that if he was touching his small dog, it might have looked as if he was touching the complainant. 9. In addition to the evidence of the complainant, the neighbours and the police, the Crown intend to adduce evidence of the following by way of background evidence and it is this which is challenged by the defence: (i) Images found on the defendant's mobile telephone of scantily clad young girl provocatively washing a car; (ii) Indecent images of young girls found on the defendant's mobile telephone; (iii) His wife's evidence of his relationship with the complainant in the lead up to the indecent assaults; and (iv) The defendant's pornographic magazine entitled "18eighteen: Back to school issue". 10. Taking each of those in turn: - (i) Images of a young girl washing a car There were 7 images of a girl between 14 and 16 washing a car wearing a white crop top and white knickers only, which were downloaded on 7 th August, 2016, some two weeks before the car washing incident under Count 3. The girl in the images has brown hair, as does the complainant. The images are not in themselves illegal, but the girl has been photographed in poses that are clearly designed to be sexually suggestive. (ii) Indecent images of young girls Of the 5,367 images on the defendant's mobile phone, 193 are of a sexual nature. Apart from the seven images referred to above, there were four indecent images of young girls at level 1; two of a girl between 9 and 12, and two of a girl between 13 and 15. There has been no prosecution of the defendant in relation to these indecent images, because of technical issues over provenance. Even so, the defendant admitted downloading these images onto his phone. (iii) Evidence of defendant's wife The Crown will seek to rely on her evidence, to the extent that it relates to the relationship between the defendant and the complainant, as witnessed by his wife, from whom he is now separated. She describes how the defendant gave the complainant food, sweets and fruit, knowing that her parents were not keen on her having food between meals and despite his wife's protestations. She describes incidents of physicality between the defendant and the complainant which made her feel uncomfortable, how he would often talk about her and how, when confronted about her, would blame the complainant. (iv) Pornographic magazine "18eighteen" This magazine is not illegal, but it is pornographic in that it contains pictures of girls over 18 who have been dressed like schoolgirls. Legal test 11. The relevant test to determine if evidence can be admitted by way of necessary background information is set out in the Court of Appeal decision in *U v AG*

[2012] (1) JLR 349, where Nutting JA said this at paragraphs 39 and 41:- "39 The seminal exposition of the admissibility of background evidence of such a kind derives from the judgment of Purchas, L. J. in the case of *R v Pitman* (12): 'Where it is necessary to place

before the jury evidence of part of a continual background or history relevant to the offence charged in the indictment, and without the totality of which the account placed before the jury would be incomplete or incomprehensible, then the fact that the whole account involves including evidence establishing the commission of an offence with which the accused is not charged is not of itself a ground for excluding the evidence.' ... But in truth all that is required is that such evidence passes the threshold test for evidence, and, although background or historical evidence may include evidence of similar fact, it is important to distinguish evidence of background from similar fact evidence because of the higher test of admissibility invariably accorded to the latter. Professor Birch pointed out the distinction in his Commentary on *R v Stevens* ([1995]) *Criminal Law Review* at 651; 'Similar fact evidence is employed as evidence which tends strongly to prove a particular fact (identity, intent, causal connection or whatever) which could be proved by other means but which the prosecution has chosen to establish by reference to other misconduct of the accused. As such, the evidence may need to be possessed of a high degree of probative value in order to buy its ticket to admissibility, for it involves 'dragging up' material which is by definition prejudicial and which might have been left out. Thus it has been said that such evidence should be admitted in circumstances where it would be an 'affront to common sense' to exclude it (per Lord Cross in *Director of Public Prosecutions v Boardman*

[1975] A. C. 421 at p. 456). Background evidence, on the other hand, has a far less dramatic but no less important claim to be received. It is admitted in order to put the jury in the general picture about the characters involved in the action and the run-up to the alleged offence. It may or may not involve prior offences; if it does so this is because the account would be, as Purchas, L. J. says in *R v Pettman* (May 2nd, 1985, unreported), 'incomplete or incoherent' without them. It is not so much that it would be an affront to common sense to exclude the evidence, rather that it is helpful to have it and difficult for the jury to do their job if events are viewed in total isolation from their history." 12. The ability to adduce such evidence is tempered by the rule that its probative value must outweigh its prejudicial effect (see the Court of Appeal decision in *Glover v AG*

[2008] JCA 118 at paragraph 19). The defence case for exclusion in summary Images of a young girl washing a car 13. Advocate Turnbull, for the defendant, said that these images need to be placed in context. They are not in themselves illegal, and are part of a single set of the same girl downloaded on the same day, and are the only examples of photographs of a car being washed by a girl found amongst 5,367 images on his mobile phone. These images were not closely and inextricably mixed up in the history of the alleged offences, and it would be inappropriate to draw inferences from them. They could not be proof that the defendant was acting out a fantasy with the complainant, or that the alleged incident was pre-planned. The position might be different if he had multiple sequences of car wash photographs downloaded on a number of different occasions. 14. The probative value of these legal images was limited, in that they showed the defendant downloaded images on a single occasion of a girl washing a car in a provocative manner, but the prejudicial effect

was significant. The Crown seek to portray a picture of the defendant playing out sexual fantasies with the complainant. 15. The Crown only had the evidence of the neighbour who saw the alleged car washing incident, the complainant herself having made no mention of it. It was seeking to bolster its case by including prejudicial evidence. Indecent images 16. As the Crown had been unable to bring a formal charge in respect of these images, due to an issue with the images' provenance, the defence argued that it was now effectively seeking to bring in this evidence under the guise of background information. It is seeking to show the jury evidence of illegal conduct by the defendant, for which it cannot otherwise charge him. The probative value of the evidence was limited, as there were only four images out of a total of 5,367, of which only 193 were sexual. The evidence of the images goes only to propensity, which is inadmissible (AG v Facchino

[2008] JLR 103). 17. There is no evidence available as to when these images may have been downloaded, so it is impossible to assess their proximity to the alleged indecent assaults, and they are not therefore closely and inextricably mixed up with the history of the alleged offences. Evidence of defendant's wife 18. The defence argued that none of her evidence relates to the four counts with which the defendant is to be tried. The defendant's wife did not see any of the alleged indecent assaults, and was not present at the time that any of them were alleged to have taken place. Her statement was taken approximately a year after the alleged assaults took place, by which time she and the defendant were engaged in divorce proceedings. Her evidence is therefore coloured by hindsight and potential acrimony between a married couple who are divorcing. The probative value of such evidence, said Advocate Turnbull, must be considered much reduced in this context. Defendant's pornographic magazine entitled "18eighteen" 19. This is a legal mainstream pornographic magazine containing pictures of adults who are dressed in schoolgirl outfits. Adult women dressed up as schoolgirls are, said Advocate Turnbull, a standard adult fantasy, and do not prove an interest in young girls. The magazine plainly contains adult women, not children, and cannot conform to the age group or appearance of the complainant. 20. It is the October 2016 edition of the magazine, purchased after the alleged assaults, and cannot form part of the

background.

It is probative of nothing, and is prejudicial, as it would be used by the Crown to suggest that the defendant had an interest in young girls. Decision 21. With one exception, I agree with Crown Advocate Hollywood that this background evidence is properly before the jury . It is relevant and its probative value outweighs its prejudicial effect. 22. The defendant, in his interview with the police, paints a picture of an innocent father/child relationship, blaming the complainant for being physically over-affectionate towards him, and indeed blaming her for kissing him. He denies any sexual interest in children. 23. As the defendant does not deny the kissing or the possibility of his touching the complainant, the key issue before the jury will be whether he did so indecently. For that, the jury need to understand the relationship between the defendant and the complainant, their respective characters and how they interacted in the period leading up to

the offences. To exclude that evidence would be to paint an incomplete picture and to invite distortion. 24. It is, in my view, relevant that two weeks prior to the car wash incident, the defendant downloaded provocative images of a girl with brown hair washing a car. It goes to show his state of mind, and may rebut his assertion that any touching on that occasion was innocent. 25. The indecent images go to show that the defendant had a sexual interest in young girls, and may rebut his assertion that he had no such interest. They are also relevant as to whether the defendant had an attraction/sexual interest in the complainant, and therefore whether his kissing/touching of her was innocent or indecent. 26. The evidence of the defendant's wife as to what she witnessed of the relationship and interaction between the defendant and the complainant in the period leading up to the offences is relevant both as illuminating their characters, but also setting the alleged offences in context. To the extent that her evidence may be coloured by hindsight or potential acrimony is a matter for the jury after hearing her cross-examination. 27. The Crown acknowledges that much of her witness statement relates to her relationship with the defendant, and is inadmissible. The Crown is therefore going to clarify with the defence precisely what part of her statement, within the above framework, it will seek to lead from her. 28. My only reservation relates to the pornographic magazine "18eighteen". Crown Advocate Hollywood argued that it showed the defendant's ongoing attraction towards younger girls, and its admission would counter any suggestion that the car wash images and the indecent images were isolated incidents, mistakes or technical glitches. She said that to deny the jury the background information of the pornographic magazine would be to remove a piece of the jigsaw. 29. Although there is no evidence as to when this magazine was purchased by the defendant, the fact that it is an October 2016 edition means that in all likelihood, it was purchased after the alleged offences, the last of which took place on 21 st August, 2016. 30. Ordinarily, such evidence would not naturally fit into the category of background evidence, although I concede that evidence of a defendant's sexual interest after an alleged offence may be relevant to his sexual interest at the time of the alleged offence. 31. My real concern is that the images in the magazine, admittedly pornographic, are all of adult women and I question whether, from the purchase of such a magazine, it can properly be inferred that the buyer has a sexual interest in girls under 16, let alone girls of the complainant's age. This is in contrast to the car wash images and the indecent images. To be part of the jigsaw properly before the Jury, the magazine has to have probative value and I doubt its probative value. Set against that, it is prejudicial, for the reasons put forward by Advocate Turnbull. 32. I do, therefore, exclude the evidence of the pornographic magazine. 33. Two further points arise: (i) The admission of this background evidence will require directions to the jury upon which I will seek the assistance of counsel in the usual way; and (ii) Crown Advocate Hollywood informed me that it was not the Crown's intention to place the actual car wash images and the actual indecent images before the jury. It is intended that, with the cooperation of the defence, they will be dealt with by way of description in a formal admission. *Authorities U v AG*

[2012] (1) JLR 349. *Glover v AG*

[2008] JCA 118. *AG v Facchino*

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