

JERSEY / JUDGMENT

AG v R [2024] JRC 184 (12 September 2024)

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JUDGMENT

THE COMMISSIONER: 1. It is a fundamental principle of our criminal justice system that the prosecution must prove their case so that the jury, or in this case the jurats, are sure of the Defendant's guilt. This is sometimes referred to as proof beyond a reasonable doubt. 2. The Defendant has to prove nothing. If the prosecution fail to discharge their burden of proof then the Defendant is found not guilty. 3. Where the prosecution case is regarded by the defence as weak or non-existent the Defendant is entitled, at the close of the prosecution case, to make a submission to the judge in the absence of the jury, or the jurats in the present case, that there is no case to answer. The grounds for a successful application are well-settled, namely that there is no evidence on which, if the evidence adduced by the prosecution were accepted, a reasonable body of jurats, properly directed, could convict. In such a case the judge will direct the jurats to find the defendant not guilty. What does the prosecution have to prove in this case? 4. In relation to the Count 1 concerning the child AA: (i) That the defendant intentionally touched AA. (ii) That the touching was sexual. (iii) That at the time AA was aged 12 years or younger. 5. In relation to the counts concerning BB: (i) That the Defendant intentionally touched BB, namely massaging the child's buttocks with his hands as alleged in Count 2, massaging the child's legs, buttocks and back with his hands as alleged in Count 3 and massaging the child's legs buttocks and back using a massage device as alleged in Count 4. (ii) That the touching was sexual. (iii) That at the time he did so, BB was aged 14. (iv) That the defendant did not reasonably believe that the child was aged 16 years or older. 6. The children's ages are not in dispute, nor is touching, although the defence disputes the allegation in Count 2 that the Defendant massaged BB on the buttocks using his hands. 7. Dealing briefly with that aspect of Count 2, BB's evidence in the ABE interview was that the Defendant only used his hands to massage BB's back. BB was asked by the police officer " does he use his hands " and BB replied, " he did once before he didn't have it " (referring to the massage gun) and when asked " OK, so when he used his hands which part of your body did he touch? " BB replied " back ". Asked " anywhere else? " BB said " no ". 8. When the officer said " OK, so when you say he's massaged you on your back your bum and your legs he's only used his hands on your back. Is that right? " BB replied " yeah ". 9. Taking the prosecution's evidence in respect of Count 2 there is no evidence that the Defendant massaged BB's buttocks with his hands and that count would fail on that point. 10. A key part of the prosecution case, and an essential element for the prosecution to prove, is that the touching was sexual. 11. Pursuant to Article 1(2) of the Sexual Offences (Jersey) Law 2018 an act, in this case touching, is sexual " if a reasonable person

would, in all the circumstances of the case, consider it to be sexual ". 12. The defence say in their submission of no case that there is no evidence in this case that would enable a reasonable person to conclude that the touching was sexual. 13. Given that there is no direct evidence of sexual motivation the prosecution argue that the following matters can be relied upon to infer that the massages given to the two children by the Defendant were " sexual ". 14. First, what could be described as the sunscreen incident: 15. The children's mother described how, early in her relationship with the Defendant, she was at St. Catherines with the Defendant and the children and as she was applying sunscreen to AA the Defendant went to put sunscreen on BB. She says that later that day she sent him a message saying that she did not like him doing that and did not like people touching her children. The message read " just so you know it wasn't anything personal about me not letting you put suncream on BB earlier, it's my issues with not liking people touch my kids' bodies and I know I need to sort it... Like I know you were trying to help but it wasn't personal towards you. I'd be like that towards anyone ". 16. There was no suggestion in the mother's evidence, or in the message, that she regarded the Defendant's action as being sexual in any way, indeed she said, " I'd be like that towards anyone ". 17. Second, the evidence of the mother of what took place when the Defendant purchased the massage gun, which she said he told her was to help her with her shoulder pain. She described how when the gun arrived the Defendant brought it upstairs and the children came into her bedroom and the Defendant massaged the children's backs with their clothes on. She said that the children found it ticklish and that she said she did not like it, as it made her feel uneasy. She said that she told the Defendant that night that he was not to do that again. It would appear that her reaction on this occasion was similar to that in relation to the sunscreen and again she did not suggest that there was a sexual element to this massage. 18. Third, the use by the Defendant of the massage gun to massage the children despite it having been used by the Defendant and C as part of sexual foreplay. C said in evidence that she was unhappy to learn that the Defendant had used the massage gun to massage the children when she had previously used it on the Defendant's " ball-sack ". She expressed her revulsion at what she described as a sex toy subsequently being used for a massage. When cross-examined on this point she likened it to " eating a cream egg that had been popped up someone's vagina ". When asked in cross-examination what the position would have been had the massage gun been a new one, C said " If the child wanted to, there would be nothing sexual ". She also accepted that a massage could be beneficial for the children and provide a chance for them to relax. It would appear that her concern over the prior use of the massage gun was principally a concern as to sexual hygiene rather than an indication of sexual activity when it was subsequently used on the children. 19. Fourth, C's reaction to finding BB and the Defendant in the lounge at the end of January 2023. C described how on this occasion she had finished her bath earlier than usual and on entering her lounge found a white duvet on the floor, the massage gun kicked to the side of the sofa, BB in underwear on the sofa covered with a blanket, a bottle of baby oil on the floor in front of the TV and the Defendant in a corner seat, she said pretending to be asleep. She said that she had a feeling that she had disturbed something and that she was not meant to be there. She said that she then said, " what have I disturbed? " and that the Defendant woke up and shouted, " why do you have to make everything so fucking sinister? ". She said that she tried asking BB what was going on and that BB was silent and that she

could see that BB was uncomfortable. She said that at this point she decided that she needed to get out of the relationship. 20. Having decided to terminate the relationship C decided that it needed to be planned and that she would do it a few days later when the Defendant was not staying with her. She said that she planned it with two of her friends and decided it should be effected by text message, which she and her brother drafted the day before it was sent. Despite what she had described seeing in the lounge she nevertheless felt able to have sexual intercourse with the Defendant when he came to the house after that incident and before the sending of the text message. 21. The text message said " we've had our good days and bad and for the good days I'm going to explain my reasons; I can't talk to you, I feel you always snap.....your actions showed that me and the [children] come last on your priority list. I love you [R] but I'm exhausted and I shouldn't have to tell you what's appropriate to a child and what isn't, obviously I'm going to be more on edge than anyone else with people around my kids but you didn't seem to understand that.... I'm sorry if I've hurt you but also thank you for a good few months... memories to last a lifetime". 22. If C believed that the Defendant had for some time been touching her children in a sexual manner it is surprising that the text made no specific mention of it. 23. When asked in cross-examination what the words " I shouldn't have to tell you what's appropriate to a child and what isn't " referred to, C said that it would have been in relation to what she regarded as an inappropriate joke that the Defendant had made in the presence of the children over the Christmas period at his mother's house and " more than likely " about what happened when she was in her bath just before she terminated the relationship. She accepted that in relation to the joke the children were likely to hear worse at school when with their mates. 24. None of the matters relied upon by the prosecution and to which I have referred suggest behaviour of a sexual nature by the Defendant towards the two children, the most that can be said being that the Defendant may have crossed certain boundaries set by C. 25. In relation to the sunscreen incident and the first use of the massage gun it would appear that C had a general dislike of other people touching her children and indeed she was at pains to point out that the Defendant should not take her rebuke personally. 26. Her description of the situation that she found in the lounge was simply that she was left with an uneasy feeling and yet this uneasy feeling was not sufficiently concerning to prevent her having sexual relations with the Defendant shortly afterwards or to feature explicitly in her communication to him terminating the relationship. 27. It is notable that in the prosecution evidence there is a distinct lack of evidence of features commonly found in cases of sexual abuse. For example, the children accepted that at no stage did the Defendant tell them not to tell their mother about the massages; the massages took place in the lounge of the property rather than in the privacy of a bedroom; there was no suggestion that the lounge door was locked; on occasions the children's mother was present in the house and could have walked into the lounge at any time; it was accepted by the prosecution that the Defendant is of previous good character; there was no evidence that the Defendant had indecent photos of children in his possession or had even searched on his computer for such material; there was no evidence that the children had removed their clothing when being massaged, nor that the Defendant had removed his clothing. There was no evidence that the Defendant sought to touch the children's genitals nor of any form of sexual arousal or sexual gratification on his part. 28. C's evidence was to the effect that from the outset the Defendant had endeavoured to

find common ground with the children. 29. It appears from the prosecution evidence that C set numerous boundaries for those close to her, one of which was that no-one should touch her two children. Far from alleging that the Defendant had behaved in a sexual manner towards them it would seem that C's principal concern was that he had disobeyed a prohibition imposed by her. 30. In this respect the Defendant may well have been naïve, and behaved foolishly, by doing something that would inevitably result in an adverse reaction from her. However, naivety and foolishness are far removed from criminality. 31. The courts and prosecuting authorities take allegations of sexual assault seriously and rightly so. The courts also endeavour to ensure that complainants are assisted and afforded protection through the use of special measures such as were used in this trial. However, cases of alleged sexual abuse must be judged according to the same fair standards that we apply in relation to all criminal charges. 32. The prosecution has to prove, so that the Jurats are sure, that the touching alleged in each of the counts was sexual, in the sense that a reasonable person would, in all the circumstances of the case, consider it to be sexual. 33. I find that in addition to the other matter that I have considered in relation to Count 2 there is, in relation to the key element of sexual touching, no evidence on which, if the evidence adduced by the prosecution were accepted, a reasonable body of jurats, properly directed, could convict in respect of any of the counts. 34. Advocate Steenson made further points in relation to the drafting of the indictment which, given my decision in relation to sexual touching, I do not propose to address further. 35. I shall now retire briefly and return with the Jurats in order to give them the necessary direction. Authorities Sexual Offences (Jersey) Law 2018. Page Last Updated: 02 Oct 2024 Back to top About JLIB Accessibility Contacts Copyright Disclaimer Feedback Privacy policy Site map BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII

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