

JERSEY / JUDGMENT

AG v RD [2024] JRC 050 (29 February 2024)

[2024] JRC 050

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JUDGMENT

THE DEPUTY BAILIFF: 1. The Defendant faces a charge of rape to be tried next week by the jury. The allegation is that on 5 November 2022 he raped the Complainant at her home. He denies intercourse. 2. The Crown rely on the evidence of Dr Evans, a forensic physician and forensic medical examiner. Dr Evans examined the Complainant approximately two and a half days after the alleged rape at about lunchtime on 8 November 2022. She discovered various genital injuries after examination which it is unnecessary to summarise for the purpose of this judgment (which in any event will be, if necessary, supplemented by a more extensive judgment after the trial). Dr Evans said that the rate of healing of genital injuries varies from two to twenty days although most injuries heal within five days. Accordingly, there was a twenty-day pre-examination window when it appears some or all of the injuries may have been caused. Dr Evans said that genital injuries can result from consensual and non-consensual penetration although those experiencing non-consensual intercourse are more likely to sustain more than one injury and more likely to have bruising or abrasions. 3. In her ABE interview, the Complainant said that she had had sexual intercourse with her former partner two or three days before the alleged rape and with another man on an unspecified date but within the two-week period leading up to the alleged rape. 4. The defence wish to cross-examine the Complainant about these incidents of intercourse in order to flag to the jury potential causes for the injuries that the Defendant denies inflicting. 5. The Crown objects to such questions being asked on the footing that the defence has no evidential foundation for suggesting that the previous incidents of intercourse may have caused injury to the Complainant. The defence drew my attention to the decision of the Royal Court in *AG v Correia*

[2015] JRC 016A (subsequently approved by the Court of Appeal) where Commissioner Sir Michael Birt held, after a review of the approach in other jurisdictions that generally, in a prosecution for rape, evidence that the complainant has engaged in consensual sexual conduct with persons other than the Defendant is not admissible save in limited circumstances but including "evidence of specific instances of sexual conduct tending to prove that a person other than the Defendant caused the physical consequences of the rape alleged by the prosecution" (paragraph 39 (iv)(a) of the judgment). 6. The Crown says that although neither party was able to cite a Jersey or English authority on all fours that the defence has not adduced evidence tending to "prove" that a person other than the Defendant caused the injuries in question and rely by analogy on the line of Jersey

authorities - most recently including AG v Lloyd

- [2023] JRC 144 - which establishes that in circumstances where the defence argue that a Complainant has made false complaints that ought to be admitted into evidence, the defence needs to show that a reasonable inference can be drawn from the evidence that the previous complaint was false and not, for example, merely not pursued or not prosecuted. 7. At paragraph 9 and 10 the Court in AG v Lloyd said: "9. As to the evidential basis that is required for such an allegation to be admitted, it is not sufficient for it simply to be evidenced that an allegation did not proceed to trial. As Rook and Ward says at paragraph 26.195: "It is now clear that where there is no evidential basis for asserting that a previous complaint was false, it is not open to an advocate to ask the question in the hope of receiving an answer that it was true and to follow up with a question as to why it had not led to charges being pursued."
10. At paragraph 26.199 it is noted: "The critical test for the defence to satisfy is that a reasonable inference can be drawn from the evidence that the previous complaint was false. This does not require every possible alternative inference to be eliminated. It is vital for the trial judge to ask himself whether the jury could be satisfied on the basis of the evidence that the previous allegation was untrue."" 8. Accordingly, the starting point is that evidence of a complainant's sexual history when a sexual offence is alleged is not relevant and accordingly not admissible. However, bearing in the mind the defence in this case a key issue is likely to be how the Complainant came by the genital injuries which she on any view sustained. 9. The Crown is correct to say that the defence has not produced any evidence to the effect that the incidents of intercourse with the Complainant refers to led or may have led to injury. Towards the end of the oral submissions, defence counsel said for the first time that he had a recording of what he was told was the Complainant's former partner saying that he had enjoyed "boisterous and rough sex" with the Complainant. But such evidence has not been reduced into writing let alone presented to me or proved to be a recording of the Complainant's former partner. Accordingly, I put that entirely to one side. 10. Nonetheless, if the jury is unaware of the fact that the Complainant did have sexual intercourse with a third party in the twenty-day window prior to her examination by Dr Evans then they may assume, wrongly, that the genital injuries can only have been caused by the Defendant. 11. There are two possible solutions to this. Firstly the jury could simply be directed that they have no evidence either way as to whether or not the Complainant had sexual intercourse with anyone else within the period in question. The difficulty with this course of action is that the jury are always directed not to speculate about matters and may, wrongly, proceed on the footing that there were no such previous incidents. 12. This is a case where Dr Evans is likely to accept, having regard to her witness statement that some or more of the injuries may have been caused by consensual sexual intercourse, as that is what she has said. Accordingly, the better course is for the defence to be permitted to ask a single question namely to ask the Complainant whether she had sexual intercourse with a person other than the Defendant within the twenty-day period prior to her examination and (in this context) the period of seventeen or eighteen days prior to the alleged rape. For this question she will

or is likely to simply answer "yes". It is important that she is notified in advance of the question she is likely to be asked so that she can give an appropriate answer. 13. In my judgment it is not necessary for the jury to be told of the number of persons the Complainant may have had sexual intercourse with or the number of occasions on which intercourse occurred. The simple question and answer which I have suggested above (which could be dealt with by way of an admission but evidence is probably more appropriate) will suffice. Of course, if the Crown choose to re-examine the Complainant in relation to the nature of such sexual contact

- for example in terms of whether or not the sexual intercourse was rough and whether it involved more than one person - then the defence would have a further opportunity to cross-examine on the additional evidence adduced. 14. The solution that I propose above is in my judgment fair to the Defendant and to the Complainant and does not stray from the principles in *Correia* or the general proposition that the evidence of a complainant's sexual history is irrelevant. 15. I should add that for the purpose of this judgment I did not receive a skeleton argument prior to the hearing from the Crown and accordingly this decision should not be regarded as a precedent but merely an exercise in case management shortly prior to trial. Authorities *AG v Correia*

[2015] JRC 061A . *AG v Lloyd*

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