

JERSEY / JUDGMENT

AG -v- T [2014] JRC 039 (13 February 2014)

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JUDGMENT

THE commissioner: 1. The defendant stands accused of two counts of grave and criminal assault and one count of indecent assault upon the same complainant at a time when he was in a relationship with her. The assize is due to commence on 17 th February, 2014, and there are two matters which I have been asked to rule upon following a pre-trial hearing which I will take in turn. Admission of "similar fact" evidence 2. A witness (Witness A) has come forward with evidence which the Crown say is relevant and therefore admissible. She alleges that she had been in a relationship with the defendant prior to his coming to Jersey in 2013 and commencing his relationship with the complainant. The Defence accept that her evidence has some relevance and is therefore admissible but apply for me to exercise my discretion to exclude it on the grounds that its prejudicial effect outweighs its probative value. In order to consider the matter it is necessary to give a brief overview of the evidence which the complainant will give. 3. The complainant will say that she was in a relationship with the defendant from around April or May 2013. The defendant had moved to Jersey from Portugal to live with the complainant and her three year old son from a previous relationship. They lived in a flat in St Helier. 4. The complainant will allege that the defendant was very controlling of her and was also very jealous of her previous relationships. She will say that between the 26 th June, 2013, and 1 st August, 2013, the defendant tried to strangle her and to gouge her eyes out when she was in bed (the first of the two counts of grave and criminal assault). She also will allege that whilst attacking her, the defendant told her that he was going to pull her eyes out so that she could not look at other men. She will say that throughout she struggled to breathe and was extremely scared, thinking she was going to die. 5. On Monday th August, 2013, the defendant, the complainant and the complainant's son had been together for the day and walked back to their flat around midnight when the complainant's son was put to bed. She will allege that around 12:45am on th August, 2013, they began arguing in the kitchen. The defendant was asking the complainant about her ex-boyfriends. He made her sit at the kitchen table and would not let her leave the room. He threw bottles of drinking yoghurt at the complainant which hit the wall and splashed on her. At some point the defendant pulled at the complainant's hair and she ended up on the kitchen floor. He then dragged her up by her hair. The complainant tried to get her mobile but the defendant grabbed it and smashed it against the kitchen table, the kitchen worktops and then the floor. The defendant pushed the complainant as she got up and tried to get past him. At one point she fell against the door and hit her arm on the door handle. The defendant punched the complainant on

the back and she was very frightened (the second of the two counts of grave and criminal assault). 6. At around 2am whilst the complainant was sitting on a chair in the kitchen she will allege that the defendant used both his hands to grab her vaginal lips through her knickers and pyjama bottoms and pull them towards him by squeezing them hard (the count of indecent assault). At the same time she will allege that the defendant was saying "tell me who has been inside you? How many sexual relationships?" and "don't lie to me, I will find out". At around 6am the defendant let the complainant leave the kitchen and go to bed. 7. There are other parts of the complainant's statements which the Crown say show that the abuse was motivated by extreme jealousy:- (i) "He (the defendant) is extremely jealous of me and doesn't trust me". (ii) The defendant referred to her as a "Whore, Bitch, Why don't you work in a brothel". (iii) She described how the defendant constantly asked her questions about previous sexual relationships. (iv) She stated that during the assault, the subject of Count 1, the defendant told her he would try and pull her eyes out so that she could not look at other men. (v) She explained that the defendant first assaulted her because she had been talking to a male friend of hers. (vi) She asserted that the defendant had told her that he would knife the people she knows and harm any men she meets in the future. (vii) The defendant told her that he used to be in the special army unit and would use extreme violence against anyone who was aggressive towards him. (viii) The defendant told her that a friend of his had been spying on her in Madeira. 8. The defendant in his interview with the police denied acting in an aggressive manner towards the complainant on the evening of 26 th August and the morning of 27 th August, 2013. He said that when they returned home after dinner and after a couple of drinks he had ended the relationship, telling the complainant that he was not happy. When he was shown photographs of the complainant's injuries he stated that he had not seen them before and he was not responsible for causing them. He denied strangling her, gouging her eyes or attempting to gouge her eyes out. 9. The legal test for the introduction of similar fact evidence was helpfully set out by the Court of Appeal in *U v AG*

[2012] (1) JLR 349 at paragraphs 12 and 13:- "12. It is common ground that the relevant legal test for the introduction of similar fact evidence involves a two-stage

analysis.

The first is a hard-edged question of relevance, at which stage the question is whether the material has any probative value. The second stage involves a discretionary exercise to determine whether the evidence should, in all the circumstances of the case, be admitted. 13. None of this is controversial or new. It is well established that similar fact evidence is admissible if it is relevant to an issue before the court, e.g. because it tends to prove one of the elements in the alleged offence, or to rebut a defence which would otherwise be open to the accused (*Styles -v- Att. Gen.* (17), following *O'Brien -v- Chief Const. (S. Wales)* (5) ([2005 2 AC 534 , at para. 67 et seq) and ultimately *Makin -v- Att. Gen. for New South Wales* (3)). The question of coincidence lies at the heart of the analysis. Evidence is likely to be admissible if an attempt to explain it away by coincidence would be an affront to common sense, or would be against all probabilities, or would only be accepted as an explanation by "an ultra-cautious jury" (referred to in *D. P. P. -v- P(1)*). 10. Archbold 14th Edition places the facts of this case in to the third of its categories that will arise in

practice, namely where there is a denial of the truth of the accounts given by the prosecution witnesses, whether it is said that they are mistaken (as a result of a vivid imagination or otherwise) or lying:- "Boardman (§§ 13-40 et seq., ante) was itself such a case; R -v- Sims (ante, § 13-42) was another. The rationale of similar fact evidence in such cases was simply stated. Two or more people do not make up, or mistakenly make, similar allegations against the same person independently of each other. In Sims, Lord Goddard C. J., giving the judgment of a full Court of Criminal Appeal, said:- The evidence of each man was that the accused invited him into the house and there committed the acts charged. The acts they describe bear a striking similarity ... The probative force of all the acts together is much greater than one alone; for, whereas the jury might think one man might be telling an untruth, three or four are hardly likely to tell the same untruth unless they are conspiring. If there is nothing to suggest a conspiracy their evidence would seem to be overwhelming" (at pp. 539-540, 168)." 11. Archbold goes on to say at paragraph 13-56:- "In such cases, the task of the judge would have been to assume that the evidence of the witnesses was true (R v H [1995] 2 A. C. 596, HL, and see now section 109 of the 2003 Act, post, § 13-104), and then ask himself whether explanation of the common allegations on the basis of chance or coincidence would have been an affront to common sense. No particular degree of similarity was required. The reality was that independent people do not make false allegations of a like nature against the same person." 12. The evidence of Witness A is currently contained in a translation of an email sent by her on 31 st January, 2013. When she comes to the Island for the trial a formal written statement will be taken from her. Rather than set out her account, which is detailed, it suffices for the purpose of this judgment to say that the Crown see the following similarities in the accounts of the two women (accepting for the purpose of this exercise that their accounts are true):- (i) The first time the defendant assaulted both women was because he believed they were interested in another male. (ii) The defendant strangled both women and threw things at them. (iii) The assaults and behaviour were promoted by extreme jealousy with the defendant repeatedly questioning both women about their sexual activities and keeping them hostage until they answered his questions. (iv) The abuse directed towards the women was the same repeatedly calling them "Whore" alleging that they were unfaithful and sexually available. (v) Both women had to give details of their every move to the defendant and where possible he would keep checks on them. (vi) The defendant maintained that he was tracking these women using their mobile telephones. (vii) He told both women that he was monitoring them on their work security cameras and, in fact, did monitor the complainant on the CCTV at Nikita where they worked. (viii) He told both women he had been in a special army unit. (ix) Both women were told by the defendant that he had friends in the army who were watching them. 13. The evidence of Witness A, say the Crown, corroborates the evidence of the complainant. Furthermore it goes to rebut the defence case that the defendant did not cause the injuries to the complainant and that she is lying. As to collusion neither women knew each other before. Witness A approached a friend of the complainant after the complaint had been made. There had been some Facebook contact which had been disclosed to the Defence and which I have seen, but none of it, say the Crown, points to any kind of collusion or indeed conspiracy to give false evidence. 14. Advocate Hall for the defendant informed me that the defendant will deny having been in a relationship with Witness A. There had been some sexual activity between them but they had never been

boyfriend and girlfriend and had never lived together. It follows that he denies the violence alleged by Witness A, as he denies the violence alleged by the complainant. Advocate Hall said that he had been in many relationships and this evidence did not disclose any *modus operandi*. It is not at all unusual she said for couples to argue or for men to be jealous. Furthermore there are differences in their accounts; in particular the allegations of violence made by Witness A were more extensive than those of the complainant. This evidence she said will go no further than to suggest to the jury that the defendant is predisposed to being jealous with his girlfriends and as a result is violent. 15. The defendant was concerned about collusion but having considered the communications disclosed by the Crown, Advocate Hall could put it no higher than that collusion was possible. This case was unusual she said in that the evidence of Witness A was not the subject of a separate account in the Indictment. Her complaints have not been investigated by the police and there is no medical evidence to support it. As she had come forward very recently none of her allegations had been put to the defendant in his interview with the police (in which he was generally co-operative) giving him the opportunity to respond. As a result he may have no choice other than to give evidence before the jury when he might otherwise have chosen not to do so.

Decision 16. I decline to exclude the evidence of Witness A. I accept that it is highly prejudicial but as Advocate O'Donnell pointed out that is always the case where evidence is highly probative. This evidence is highly probative. To begin with it is evidence of the woman who was in a relationship with the defendant before he came to Jersey. It is not evidence of the ordinary rough and tumble of couples living together. This is evidence of an extreme form of obsessive jealousy which both women allegedly experienced with all of the similarities set out by the Crown, which I accept. Assuming that the evidence of Witness A is true, which I have to for the purpose of this exercise, to explain these similar allegations on the basis of chance or coincidence would in my view be an affront to common sense. 17. Advocate Hall did not suggest, and I believe there is no authority to support the suggestion, that such evidence can only be admitted if the defendant had been given an opportunity to respond to it in an interview with the police. This witness has come forward belatedly with relevant and admissible evidence and as in any trial the defendant has a choice whether to give evidence or not upon which he will no doubt be advised; I see nothing unfair in that. I have taken into account that these allegations are not the subject of a separate count before the jury and have not been investigated by the police. None of this weighs the balance towards exclusion. Witness A will be subject to cross-examination in the usual way and it will be for the jury to assess her evidence. 18. As to collusion it is clear from the House of Lords decision in *R v H (A)* 1995 2 CR. App. R. 437 that the issue of possible collusion is not relevant at this stage and should be left to the jury. Quoting from the headnote in that case:- "Held, dismissing the appeal, that where on an application to exclude on the ground that it does not qualify as similar fact evidence, the submission raises a question of collusion (deliberate or unconscious), the judge should approach the question of admissibility on the basis that the similar facts alleged are true and determine whether the probative force of the evidence made it fair to admit it, notwithstanding its prejudicial effect. Generally, collusion was not relevant at this stage. If a submission was made which raised collusion in such a way as to cause the judge difficulty in applying this test he might be compelled to hold a *voire dire*. If in the course of the trial it became apparent that no reasonable jury could accept the evidence as free from collusion,

then the jury should be directed that it could not be relied upon as corroboration or for any other purpose adverse to the defence. Where this was not so, but the question of collusion had been raised, the judge would draw the attention of the jury to the importance of collusion and tell them that if they were not satisfied that the evidence could be relied upon as free from collusion, it could not be used as corroboration or for any other purpose adverse to the defence." Collusion has not been raised in this case in such a way as to cause me difficulty in applying the test. The issue of collusion will therefore be left to the jury and made the subject of an appropriate direction. Application to overrule the discretion of the Crown 19. The Crown notified the Defence (Advocate O'Donnell says in error) that it was intending to call Witness B as a prosecution witness. The Crown has since decided not to call her, but will make her available at the trial if the Defence wish to call her. 20. Witness B was not a witness to any of the assaults but, along with a number of other witnesses, did see bruising to the complainant's neck after the first of the alleged grave and criminal assaults. She, again like others, will also say she saw a change in the complainant's demeanour during her relationship with the defendant. 21. The Defence wish her to be called by the Prosecution because they wish to cross-examine her over the complainant's statement to her that the bruising on her neck had been caused by "a fight with a girl", which is consistent with the evidence that the defendant will give. The Defence also wishes to put to her an assertion that she and the complainant were involved in a Social Security fraud, i.e. to discredit the complainant. 22. It was agreed by counsel that the principles to be applied are those set out in the case of *R v Russell-Jones*

[1995] 1 Cr. App. R. 538 as summarised in Archbold at paragraph 4-347 which provides at subparagraph 7 as follows:- "7. A prosecutor properly exercising his discretion will not therefore be obliged to proffer a witness merely in order to give the defence material with which to attack the credit of other witnesses on whom the prosecution rely. To hold otherwise would, in truth, be to assert that the prosecution are obliged to call a witness for no purpose other than to assist the defence in their endeavour to destroy the Crown's own case. No sensible rule of justice could require such a stance to be taken." 23. As made clear in Archbold the Court in *Russell-Jones* added that these principles should not be regarded as a lexicon or rulebook to cover all cases. There may be special situations that had not been adverted to, and in every case, it is important to emphasise, the judgment to be made is primarily that of the prosecutor, and, in general, the Court will only interfere with it if he has gone wrong in principle. 24. The prosecutor's discretion is not unfettered in that it must be exercised in the interests of justice so as to promote a fair trial but I see no evidence that the Crown have gone wrong in principle here and there are no grounds upon which I can properly interfere. If the Defence wish to use Witness B to attack the credit of the complainant then it must call her; she will be made available for that purpose. 25. It is clear that the Crown have this matter under review and Advocate O'Donnell has indicated that in relation to the Facebook communications which have recently been disclosed, the Crown may proffer Witness B for cross-examination on that issue alone (if that is possible). These are matters which are still under discussion between counsel and may be the subject of a further application. In the meantime I decline to

override the discretion of the Crown in respect of this matter. Authorities U v AG

[2012] (1) JLR 349. Archbold 14th Edition. R v H (A) 1995 2 CR. App. R. 437. R v Russell-Jones [1995] 1 CR. App. R. 538. Page Last Updated: 18 Jan 2017 BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII

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