

JERSEY / JUDGMENT

AG -v- U [2011] JRC 124 (24 July 2011)

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JUDGMENT

THE commissioner: 1. The prosecution seek leave to adduce evidence prejudicial to the defendant in order to rebut a defence which would otherwise be open to him. It does so in reliance upon the well known passage in *Makin-v-Att-Gen* for New South Wales

[1894] AC 57 PC which remains a starting point for any analysis of this part of the law:- "The mere fact that evidence adduced tends to show the commission of other crimes does not render it inadmissible if it be relevant to an issue before the jury, and it may be so relevant if it bears on the question of whether the acts alleged to constitute the crime charged on the indictment were designed or accidental, or to rebut a defence which would otherwise be open to the accused ". (My emphasis) 2. Following *DPP-v-P*

[1991] 2 AC 447 the issue of admissibility is now reduced to the following balancing exercise namely whether the evidence has sufficient probative force to make it just to admit it notwithstanding that it is prejudicial to the defendant intending to show he was guilty of other crimes. The judgment in *DPP-v-P* is expressly derived from the speeches in *DPP-v-Boardman*

[1975] AC 421 from which it is clear that coincidence lies at the centre of the necessary

analysis.

Evidence is likely to be admissible if an attempt to explain it away by coincidence would be "an affront to commonsense" or would be "against all probabilities" or would be accepted as an explanation only by "an ultra cautious jury". 3. The defendant is charged with having made 625 indecent photographs of children; that activity is set out in the twelve counts which he faces on the Indictment against him. The evidence against him takes the form of images recovered from his computer. That computer was seized from him at the time of his arrest at his flat on 26 th February, 2010. The defendant can point to the fact that he and a boy named BB shared accommodation for some four or five years, from about 2005 to 2010. The shared accommodation latterly included the defendant's flat from which the computer was seized, although BB had moved out some weeks before the defendant was arrested and the computer seized. BB is now 17 years old; while living with the defendant he was between about 12 and 16 years old. Originally the defendant and BB both lived with BB's adoptive parents at their family home. When BB was 15

or 16 he and the defendant moved out together and lived with each other in various flats. This history of a shared accommodation enables the defendant, so the prosecution say, to say that BB had access to any computer associated equipment owned by the defendant during the 4 or 5 year period just described. The defence is therefore placed to say that BB was or may have been responsible for downloading the photographs which form the subject of the charges against the defendant. The prosecution says it is on notice that the defence will take that course. 4. It is indeed the case that the seized computer or at least its operating system is expressed to be in the joint ownership of the defendant and BB, evidenced by the user account in their combined names. It is this computer which contains the evidence of the indecent photographs of children which the defendant is charged with making. 5. In summary therefore, the prosecution say it is on notice that the defence in whole or in part is going to be that BB shared the seized computer and was responsible for the indecent images found there. It is true that the defendant and BB lived together, first with BB's adoptive family and then without them at material times. It is also true that the defendant and BB had a shared area on the computer. 6. To counter that defence the prosecution says it can point to the fact that the earliest illicit photograph charged dates back to 2002. It derives from an earlier computer at a time when BB was just 9 years old and therefore at a time before the defendant lived with him or even knew him. This is unlikely to be a complete rebuttal of the defence as it will go to images with earlier dates but not to images with later dates, that is to say dates when BB had access to the shared computer. It is because of the need to counter the available defence that the prosecution argues for the admission of evidence as per the following:- (i) Evidence A. The defendant's credit card was used on 3 rd April, 2003, to buy access to a website showing indecent images of children, "erect x boys", this came to light in 2005 and was the subject of a police enquiry at that time. The defendant explained the transaction by saying that the use of his credit card had been unauthorised, he had known nothing about it and the bank had reimbursed him. The inquiry at the time neither proved nor disproved this. (ii) Evidence B. As part of the enquiry just mentioned, a computer was seized from the defendant in 2005. It was an Acer laptop, not the Acer tower computer seized from the accused in 2010 involved in the present charges. A forensic examination of that 2005 computer conducted by DC Perchard found no evidence of illicit photographs. Such evidence was found by subsequent analysis for the same data by Mr Russell and the prosecution relies on it in the course of the present prosecution. The pertinent feature for the purposes of the present application however is that the 2005 report by DC Perchard has an appendix of websites visited by use of the Acer laptop. There are very many references apparently to sites which are, say the prosecution, obviously peddling indecent pictures of boys - "schoolboys secrets", "boys love", "boy fantasies", "mexican twink", "fucked boys. info", "dadonboy.com"; "twink.xxl dick.com"; "ah-twinks.com"; "russianboys"; "youngestweb.com"; "gayandyoung.com" are just some of the examples. This computer was seized at a time when BB was 11 years old and therefore at a time before the defendant lived with him or had even met him. The defendant lived alone at his flat at the time of the seizure. (iii) Evidence C. The defendant was found in possession of a film of himself sexually assaulting BB at a time when BB was 14 years old. This film was found because BB informed on the defendant. It is unlikely that he would have done so if it meant causing the police to conduct investigations which would have revealed offences by BB himself, say the prosecution. 7. The

prosecution puts its case for admission of this evidence in this way. None of the evidence which the prosecution seeks to prove in evidence is advanced to show that the defendant has the propensity to commit a crime; rather each of the things is capable of proving an interest by the defendant in indecent photographs of young boys. Given that his defence is not a straight denial but may actively blame someone else for downloading indecent photographs of young boys, there is, say the prosecution, a compelling case for admissibility. The items go to the defence being run, i.e. they go beyond propensity, proclivity and are relevant to contradicting the assertion that it was BB who was responsible for downloading the indecent photographs of children recovered from the defendant's computer. It is the defendant and not BB who has a demonstrable history of involvement with indecent images of boys, again say the prosecution. The evidence identified by the prosecution is capable of rebutting the defence which is otherwise open to the defendant to run with impunity, particularly in the absence of BB. Turning to the evidence.

8. Evidence A. Purchase of access to a website containing indecent pictures of young boys took place on 3rd April, 2003. At that time BB was 9 years old and the defendant had not met him. It follows say the prosecution, that *prima facie* it was the defendant who was responsible for buying access to indecent photographs of young boys. He said at the time that someone else had used his property i.e. his credit card to purchase access to these pictures. It cannot have been BB for the reasons given above. In 2010 indecent images of children were found on the defendant's computer, once again he may say that someone else, this time BB, had used his property, the computer, to access indecent photographs of children. The prosecution says that this is a repetitive situation and that it is against all probabilities that two people, one unspecified and one a boy in his early teens, seven years apart, would have made unauthorised use of the defendant's property to gain access to indecent photographs of children. That would be accepted as an explanation only by an ultra cautious jury.

9. Evidence B. The computer seized from the accused in 2005 had been used to visit websites containing indecent photographs of young boys. At that time BB was 11 years old and the defendant had not met him. The computer seized from the defendant in 2010 also contained indecent photographs of young boys. BB cannot have been responsible for accessing the indecent photographs with children websites used by the 2005 computer. The evidence of the 2005 visits to websites containing indecent photographs of male children is capable of rebutting the defence that BB was responsible for accessing indecent photographs of male children. BB and the defendant were unknown to each other at the time of the 2005 activity. Therefore, says the prosecution, the defence would again necessarily involve the coincidence that the defendant's computer had been used in 2005 to pursue an interest in indecent photographs with children by someone other than BB and that a different computer belonging to the same defendant had, five years or more later, been used by BB to pursue an interest in indecent photographs of children while still a child himself. The prosecution, once again, says that such a coincidence is against all probabilities and would be accepted only by an ultra cautious jury.

10. Evidence C. The defendant had in his possession a film of himself indecently assaulting BB. BB then informed on him. Firstly the filming shows an interest by the defendant in making indecent photographs of children and retaining them. Given this interest it would be against all probabilities, say the prosecution, that by coincidence the child in the photographs had an interest in indecent photographs of children and was responsible for

downloading such photographs onto U's computer. 11. The application is resisted by Mr Blakeley on behalf of the defendant. He asked me at the outset to keep asking the question, which I have done, what is the probative value of this evidence that the prosecution seeks leave to adduce? The defendant has given notice of a potential alibi for the evening of 25 th February, 2010, and the morning of 26 th February, 2010, i.e. just before his arrest that will apparently show that he could not have been using his computer at the time when the expert evidence will show there was a great deal of activity on it. Furthermore, when the defendant was arrested there was a gap of some four hours before the police returned to seize the computer during which time it was in the flat unattended. Someone could have had access not only to the computer but also to remove the stick which the experts may say may have been used to enable these images to be viewed on a computer. The defendant, he says, is not going to assert that these images were the responsibility of BB, it is merely going to put the prosecution to proof, i.e. to prove beyond reasonable doubt that it was the defendant who was responsible. The defendant's expert has found only one user created account on the 2005 Acer laptop named C. Who was she Mr Blakeley asks; p the implication being that other persons may have had access? 12. In relation to Evidence C, the film taken by the defendant, this is quite different says Mr Blakeley to the downloading of images on a computer, although he accepted that the subject matter, sexual abuse of a young boy, may be the same. One he has kept, the others he is alleged to have deleted. What is the probative value of such evidence, again Mr Blakeley asks. 13. In relation to Evidence B there was no evidence that the defendant had downloaded any material from any of these sites. The prosecution cannot say who visited these sites, who was on them, when they were visited and what was downloaded; therefore again, what is the probative value of the evidence Mr Blakeley asked. 14. The police had searched for evidence of access to two websites, "erect boys", using an internet archive site known as the wayback machine and Mr Blakeley took me through some of the printed results. His expert had apparently found one indecent image but how, he asked, do we know that the defendant visited it? Notwithstanding what many would regard as a very clear indication in the name of the site as to what it might contain, he drew my attention to the following example of a disclaimer:- "Our site supports the laws in United States of America and gladly and willingly conforms to these laws. The site is dedicated to the beauty of nude boys under eighteen years old and honours the purity and innocence of youth. In supporting the laws in the United States of America "erect boys" vehemently opposes what is commonly referred to as child pornography and legally defined by as images containing sexually explicit conduct". He also drew my attention to the statement of a prosecution witness D, later contradicted that BB had access to the defendant's flat after his departure and before his arrest. Despite drawing it to my attention Mr Blakeley declined to indicate whether the defence would seek to draw this evidence out as part of the defence. In his submission Mr Blakeley says that there is only one purpose in the prosecution adducing this evidence and that is to show propensity. The evidence, he says, has little probative value and will taint the defendant for the whole of his trial. 15. The admission of prejudicial evidence of this kind is a matter that requires careful consideration. The defendant accepts, as I understand it, that the images subject to the charge were recovered from his computer and so his defence must at least involve pointing to others who may have had access to his computer, in particular BB. It is clear to me, and the prosecution is on notice, that the evidence will lead the

defence in this direction. The prosecution are therefore entitled, in my view, to adduce evidence to rebut that defence. Without repeating them here I accept the contentions of the prosecution and I am satisfied that notwithstanding the criticisms of this evidence voiced by Mr Blakeley, the probative value of it is sufficiently great to make it just to admit and I so order. It will of course be a matter for the jurors to decide what weight if any to give to this evidence, once tested before them, and in the light of counsel's

submissions.

16. The defendant is remanded again in custody for the trial starting on Tuesday. Authorities Makin-v-Att-Gen for New South Wales

[1894] AC 57 PC. DPP-v-P [1991] 2 AC 447. DPP-v-Boardman [1975] AC 421. Page Last Updated: 07 Feb 2017 BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII

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