

JERSEY / JUDGMENT

AG -v- W [2014] JRC 083 (28 March 2014)

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JUDGMENT

THE commissioner: 1. The defendant, who is 75, applies for the prosecution against him to be stayed for abuse of process and failing that, for the evidence of one of the complainants to be excluded. 2. The defendant stands accused of eighteen counts of alleged sexual abuse involving three complainants. In very brief terms, the defendant came to Jersey from London in 1957, when he was in his late teens. In due course, he met and started to live with E, who had three children from her estranged husband, G. Those children had a disrupted upbringing, living their early years at the Crèche and at Haut de la Garenne and with their father. In 1961, the eldest child, B, who I will refer to as the first complainant, came to live with her mother and the defendant when she was 13½ and it is alleged that within a month, the defendant began to indecently assault her when the mother was out of the house at work as a nurse. The charges in respect of this complainant cover the period 1961-1963, with conduct which allegedly escalated from kissing her on the mouth and touching her on the upper thigh to lying on top of her in her bed simulating intercourse to the point of ejaculation. 3. On 21 st March, 1964, the mother came home to see the defendant and B kissing and cuddling on the sofa in the lounge and reacted with some anger, throwing a brick through the lounge window. She called the police. According to B's statement, she told her that she knew something had been going on - she had found semen on the bed clothes which had raised her concerns. The father was arrested and on 23 rd March and remanded in custody for a week. The very few records which exist show that he was charged with two counts of indecent assault upon B on three occasions between 17 th March and 22 nd March, 1964. On 31 st March, 1964, he was discharged on all counts. I will return to this, but it can be seen that the present prosecution is restricted to alleged offences committed in the three years preceding 1964. 4. The defendant and E had three children from their relationship and the second complainant is their eldest child, C. The charges in respect of this complainant cover the period 1965 - 1974 and allege sexual offending by the defendant spanning the period from when she was about 6 years old to 15 years old. The conduct alleged escalated from his touching her vagina by placing his erect penis between her thighs and towards her vagina as she lay with her back to him, taking her to bed and lying on her with his head down in her groin as he licked her vagina (with her later finding ejaculate on her night-dress) to one charge of rape when she was 15 years old. 5. The first complainant grew up and joined the Army where she had two children by different men, one of whom was the third complainant, A. The first complainant returned to Jersey with her children, having got back in touch with her mother, and an adult relationship

developed between her and the defendant, who eventually left E to live with her. The charges in respect of the third complainant cover the year 1974 when she was 6 or 7 years old and which involved his allegedly slipping his hand down her trouser pyjama bottoms and placing his finger between her labia moving it in a circular fashion, and taking her hand and placing it on his penis rubbing with a circular motion. 6. Advocate Cadin, for the defendant, raised submissions in relation to each complainant to which I will come in a moment, but common to all three was the very great delay in these complaints being prosecuted (the alleged offences took place from 40-53 years ago) with all the problems that go with that and the disclosure process of which he was highly critical to the point of arguing that the Defence and the Court could no longer rely on the Crown to fulfil this vital function. The law 7. It is helpful to start with the law in relation to an application for a stay for abuse on which counsel were in agreement. Jersey law follows English law in this respect (see AG-v-Steel and Powell

[2003] JRC 172B), but the law in this area has recently been considered by the Privy Council on appeal from this Court in Warren-v-AG

[2011] JLR 424 , where it was held:- "The Court had power to stay proceedings for abuse of process in two distinct categories of case: first, where it would be impossible to give an accused a fair trial; and secondly, where it offended the court's sense of justice and propriety to be asked to try an accused in the particular circumstances of the case (to avoid confusion, the issue in the second category should not be framed as whether it would be "fair" to try the accused). In the first category, if the court concluded that an accused could not receive a fair trial, it would stay the proceedings without more. No question of balancing competing interests would arise. In the second category, the court was concerned to protect the integrity of the criminal justice system. A balance had to be struck between the public interest in ensuring that those accused of serious crimes should be tried and the competing public interest in ensuring that executive misconduct did not undermine public confidence in the criminal justice system and bring it into disrepute. An infinite variety of cases could arise. Among the factors frequently taken into account by the court when conducting the balancing exercise were the seriousness of any violation of the accused's (or a third party's rights) rights; whether the police acted in bad faith or maliciously, or with improper motive; whether the misconduct had been committed in circumstances of urgency, emergency or necessity; the availability of a direct sanction against those responsible for the misconduct; and the seriousness of the offence with which the accused had been charged. Whether it could be said that "but for" an abuse of executive power an accused would not have been before the court at all was a factor for consideration but it would not always or even in most cases necessarily determine whether a stay should be granted. Proceedings should not be stayed for abuse of process merely to punish prosecutorial or police misconduct." 8. Advocate Cadin submitted that both cases applied here, namely that the defendant could not now receive a fair trial and the Crown's conduct in relation to disclosure was such as to undermine the integrity of the criminal justice system. 9. In 2011, a five man English Court of Appeal in R v F(S)

[2011] EWCA Crim 1844 sat to clarify the law where abuse of process submissions were advanced on the grounds of delay. The Court of Appeal emphasised the distinction between such an application and a submission of "No case to answer". Quoting from the judgment of Lord Judge C. J. at paragraphs 39 - 41:- "39. Accordingly in our judgment any suggestion that, on the basis of delay, the judge may be responsible for assessing whether, in advance of a conviction, the conviction would be unsafe, is based on a misunderstanding of the principles in both Galbraith and Attorney General's Reference (No 1 of 1990). The judge, of course, is responsible for the conduct of the trial. That responsibility extends to deciding whether the trial should be stayed because it would constitute an abuse of process, applying the principles relevant to that question, and the distinct, separate question, whether at the end of the prosecution case, the jury should be directed to return a "not guilty" verdict or verdicts on the Galbraith principles. These are distinct features of the trial process and neither of these separate responsibilities of the judge should be elided with each other, or with the equally distinct responsibilities of the jury. 40. In the overwhelming majority of historic sex allegations the reasons for the delayed complaint, and whether and how the delay is explained or justified, bear directly on the credibility of the complainant. They therefore form an essential part of the factual matrix on which the jury must make its decision. That is the principal and, in the overwhelming majority of cases, the only relevance of the evidence on these

issues.

When, in the authorities to which we have referred, it is clearly stated that an abuse of process argument cannot succeed unless prejudice has been caused to the defendant, the principles do not normally encompass the explanation for the delay, nor do they extend to the explanation or explanations which the judge himself or herself may regard as inadequate or unsatisfactory or inconsistent. Indeed features like these are revealed by and become apparent through the ordinary processes of trial, and these questions remain pre-eminently for the jury. Although therefore they may be relevant to submissions that there is no case to answer (carefully considered in the context of the limitations imposed by Galbraith) it is difficult to conceive of circumstances in which they have any relevance to an abuse of process argument, unless in some manner they impact on the question whether there can be a fair trial. The explanations for delay are relevant to an application to stay only if they bear on how readily the fact of prejudice may be shown. Unjustified delay in the making of the complaint, and even more so institutional prosecutor misconduct leading to delay which is what the court was considering in Attorney General's Reference (No. 1 of 1990) may make the judge more certain of prejudice, which may even have been the aim of the delay. That is the import of the references in the cases to the reasons for the delay. That is, however, a long way from the proposition that unjustified delay is by itself a sufficient reason for a stay. It is not. 41. Indeed, on analysis, inquiry into the complaint where a sexual allegation is made, and the circumstances in which the complaint came to be made, is likely to be relevant to the credibility of the complainant, whether the allegations fall within the wide ambit of what are described as historic allegation, or allegations made at the

time when the alleged offences occurred, or shortly afterwards. We cannot see any justification for the creation of a differential evidential test to be applied at the close of the prosecution case when the allegation is of long past sexual offending from that which applies at the end of the prosecution case in any other criminal allegation, and in particular, in relation to an allegation of recent sexual offending, whether reported immediately, or virtually so. There is no reason, and it would be virtually impossible, to identify the elapse of time which has the consequence that the proper examination of these questions should, in effect, be removed from the jury." 10. The Court of Appeal re-affirmed the general principles to be applied as identified in Attorney General's Reference No 1 of 1990

[1992] 1 QB 630 and R v Stephen Paul S

[2006] EWCA Crim 756 . Quoting from paragraph 21 of the judgment in the latter case:- "(i) Even where delay is unjustifiable, a permanent stay should be the exception rather than the rule; (ii) where there is no fault on the part of the complainant or the prosecution, it will be very rare for a stay to be granted; (iii) no stay should be granted in the absence of serious prejudice to the defence so that no fair trial can be held; (iv) when assessing possible serious prejudice, the judge should bear in mind his or her power to regulate the admissibility of evidence and that the trial process itself should ensure that all relevant factual issues arising from delay will be placed before the jury for their consideration in accordance with appropriate direction from the judge;

(v) if, having considered all these factors, a judge's assessment is that a fair trial will be possible, a stay should not be granted." 11. The Court of Appeal further held that an application to stay for abuse of process ought ordinarily to be heard and determined at the outset of the case, as has occurred here, and before the evidence is heard, unless there is a specific reason to defer it because the question of prejudice can be better determined at a later stage. 12. The burden of proof rests on the defendant to show why a stay should be imposed on a balance of probabilities (see paragraph 17 of R v F(S)). 13. In R v Frank Joynson

[2008] EWCA Crim 3049 , the English Court of Appeal described delays of between 39 and 63 years as extreme, even by the standards of courts used to trying allegations of historic sexual abuse and the delay in this case can be so described. Even so, there is no prescription for such offences and as made clear in R v F(S) , such a delay is not, by itself, a sufficient reason for a stay. Disclosure 14. The defendant was indicted before the Royal Court on 12 th July, 2013, when his trial was ordered to commence on th November, 2013. A plea and directions hearing was fixed for 1 st October, 2013, and at that hearing, a number of directions were given, including a direction that the Crown would disclose any unused material by 4 th October, 2013. Working from the correspondence, it would seem that the Defence had been given a copy of list A2 and list B1 at the time of committal. Pursuant to the direction, Crown Advocate Baker wrote to Advocate Corbel on the 3 rd October, 2013, who was assisting her colleague Advocate Cadin, with further disclosure by which list B1 had been updated. 15. Advocate Corbel responded by letter dated 15 th

October, 2013, formally requesting further disclosure to be made. On the authority of *R v Flook*

[2010] 1 Cr App R 30 (followed by this Court in *Syvret-v-AG*

[2011] JRC 060A and *AG-v-H*

[2012] JRC 175) to the effect that there was an obligation on the Crown to pursue reasonable lines of inquiry in relation to material held by third parties, Advocate Corbel sought disclosure in relation to the Social Service records of all three complainants, any claims they may have submitted to the States of Jersey Historic Abuse Compensation Scheme and any Hospital/Health and Social Service and Employment Records relating to E and the defendant. She noted with concern the unexpectedly large amount of material disclosed by the Crown on 3 rd October, and gave notice that an application for an adjournment might be inevitable. 16. The Defence were given access (it would seem unusually) to review the unused material listed on B2 at Police Headquarters. Following this, Advocate Corbel wrote to Crown Advocate Baker on 15 th October, 2013, giving notice of an application to stay counts 1-6 of the indictment (namely those covering the complaints of the first complainant) as being an abuse of process on the basis that the Court could not adequately safeguard against the possibility of allegations being tried in contravention of the principle " autre-fois acquit" . Further, given the absence of contemporaneous police documentation and/or statements of the proceedings in 1964, the defendant would be severely hampered in the conduct of his defence as a consequence of which he would not be able to have a fair trial. Further disclosure was sought including disclosure from third parties. Given the volume of material disclosed by the Crown on 3 rd October notice was given that the Defence may need to make an application for an adjournment. Advocate Baker responded on 17 th October, 2013, setting out his position in relation to disclosure and inviting the Defence to make an application where there was disagreement. 17. The Defence applied for the trial to be adjourned on 6 th November, 2013, a week before the trial was due to commence, essentially on two grounds set out in Advocate Cadin's letter to the Court dated 4 th November, 2013, firstly that the process of disclosure was still ongoing and secondly that the Defence was not ready for the trial and its application in relation to counts 1-6 for a stay. Without making any criticism of the Crown, Advocate Cadin expressed concern that the disclosure exercise may not have been as rigorous as it should be in a case ranging back 52 years to 1961. At the hearing he asked the Court to case manage the process of disclosure. 18. Crown Advocate Baker resisted the application for an adjournment. He argued that disclosure had been as thorough and timely as the circumstances of the case permitted and had been conducted in accordance with the Attorney General's Guidelines. He had described Advocate Cadin's concerns in an email as "a storm in a teacup" which he told the Court could be dealt with by discussion between experienced counsel and though formal admissions. He referred to the Guernsey Court of Appeal decision of *Taylor v Guernsey Law Officers of the Crown* GLR 2007/8 and to the Jersey Attorney General's Guidelines from which I drew the following:- (i) The duty falls on

the Crown Advocate to assess material gathered in the course of an investigation for the purpose of disclosure. (ii) In the absence of a clear indication to the contrary, the Crown Advocate must be expected and trusted to carry out that task fairly and conscientiously. (iii) It is not the duty of the Crown Advocate to consider whether material exists in the possession of third parties which may afford some support to the defence; whilst the Crown Advocate is a minister of justice, it is not for him to do defence counsel's job. However, as a matter of professional prudence, where the Crown Advocate suspects that reliable third party material exists, which may have a potentially negative bearing on a prosecution case, the Crown Advocate would be wise to inquire whether such material exists and, in broad terms, the nature of it. (iv) Where the defence considers that a third party may be in possession of relevant material, it is a matter for the defence to request it and, if refused, to make an application to the Court; and (v) Disclosure should always be considered by the Crown Advocate as soon as possible. 19. The application for an adjournment was granted by me on the 7 th November, 2013, for the reasons set out in an oral judgement but centrally I was not satisfied that the Defence had been given proper time to consider the material disclosed and any enquiries it may wish to conduct or applications it may wish to bring prior to trial. I was not prepared to case manage the work of Crown Advocate Baker in relation to disclosure as there was no clear indication that he could not be trusted to carry out that task fairly and conscientiously . It was clear, however, that there were issues in relation to disclosure between the parties which it would be helpful for the Court to resolve. I therefore retained Friday 22 nd November, 2013, for the hearing of any applications which the defence wished to bring in relation to disclosure and gave directions for the filing of sequential skeleton arguments. 20. Further disclosure was made by the Crown and correspondence exchanged between the parties but no application was made in relation to disclosure by the defence at the hearing on 22 nd November, 2013. By that stage, the Defence were anticipating applying for a stay of all of the proceedings. The 14 th March, 2014, was fixed for that stay application to be heard which I later directed should be by way of a pre-trial hearing and not as a preparatory hearing (which the defence had proposed). The trial was fixed for the eight days commencing 7 th April, 2014, before the Inferior Number (at the election of the defendant). 21. On 31 st January, 2014, Advocate Cadin wrote to Crown Advocate Baker a lengthy letter inviting the Crown to discontinue the proceedings as a whole. It comprises a detailed critique of Crown Advocate Baker's conduct of the disclosure process which Advocate Cadin said appeared " to be entirely random, poorly thought out, incompletely executed and (to the extent it has been undertaken at all), has occurred very late in the day ". Moreover, he said, despite the fact that the disclosure which had occurred before the scheduled trial was plainly inadequate, on 6 th November, 2013, when the case was before the Court for the adjournment application, the Crown persisted in its assertion that not only was the case ready for trial, but that it had complied fully with his disclosure obligations. In view of the disclosure that had transpired since, he could not understand how assertions made by Crown Advocate Baker during the course of that argument before me came to be made at all. He regarded the position adopted by the Crown on that

occasion as thoroughly misleading to his firm, the defendant and the Court. 22. Crown Advocate Baker responded briefly on 6 th February, 2014, saying that having considered the letter, the Prosecution intended to proceed to trial. As a hearing of the stay application had been listed with an exchange of skeleton arguments directed, the Prosecution would accordingly await Advocate Cadin's skeleton argument before responding. Further disclosure by the Crown followed. 23. Advocate Cadin did not go through each and every aspect of the alleged failures in relation to disclosure in his skeleton argument as it is set out at length in the correspondence but he advanced two generic arguments firstly as to what he described as the woeful nature and extent of the enquiries and secondly as to the Crown's approach to disclosure of material which it had identified and held. 24. I can appreciate that in a case such as this, there are usually no independent witnesses to the events complained of, few if any contemporaneous documents and no alibis that can be raised. Much will depend on the ability of the Defence to attack the credibility of the complainants and its ability to do that will depend in substantial part on material that can be obtained from third parties, whether here or outside the jurisdiction. Much of the information that the defence will be interested in will be confidential, requiring the consent of the complainants and the Crown is best placed to procure that. 25. The whole disclosure process, Advocate Cadin said, has been shrouded in mystery. The starting point on disclosure, he said, must be a clear and precise schedule setting out each and every inquiry made, its timing, its result and the nature and basis of any decision to disclose or withhold material. That submission was not supported by any authority or by any part of the Attorney General's Guidelines. 26. Crown Advocate Baker submitted that in a case such as this the investigation had been necessarily complex and it would be remarkable if disclosure were to be achieved seamlessly. It would not be reasonable to suppose that the total flux of information can be known and managed from the outset without encountering problems. He pointed inter alia to the time period involved going back 50 years, there being three complainants (initially four) one of whom spent time in care in Jersey, two of the complainants now living outside the Island, family circumstances meaning that each of them had been known under a variety of names over the years (one of them having had at least five names) and the need to inquire into historical records from agencies and other sources in three different jurisdictions. 27. The Crown, he said, was not required to provide information which had no bearing on the offences charged or the circumstances of the case and on matters such as medical records may have a duty to assert confidentiality. It was not the duty of the Crown to comb through all the material in its possession on the look out for anything that might conceivably or speculatively help the Defence; its duty was to disclose material that met the disclosure test which it become aware of or to which its attention is drawn. He said the Crown had repeatedly asked for the Defence engagement on this to no avail. It was important that the trial process was not overburdened or diverted by erroneous or inappropriate material and accordingly the Crown should not abrogate its responsibility for examining the material in order to apply the principles of disclosure. The Crown can only be expected to anticipate what material might be disclosable in the light of information available at the time of the disclosure

decision. 28. In England, the process of disclosure is governed by the Criminal Procedure and Investigations Act 1996 (CPIA) and the CPIA Code of Practice . These require timely dialogue between the prosecution, defence and court to enable the prosecution properly to identify material which has not previously been disclosed to the accused and which might reasonably be considered capable of undermining the case for the prosecution against the accused or of assisting the case for the accused (Attorney General's Guidelines on Disclosure 2013 paragraph 1). The Judicial Protocol on the Disclosure of Unused Material in Criminal Cases (December 2013) provides that active participation by the court in the disclosure process is a critical means of ensuring that delays and adjournments are avoided. Key to that is the obligation on the defence to file a defence statement before disclosure issues can be raised and for consideration at the first plea and case management hearing. The defence must engage and assist in the identification of the real issues in the case and, particularly in the larger more complex cases, to contribute to the search terms to be used for, and the parameters of, the review of any electronically held material (which can be very considerable). Any defence criticisms for the prosecution approach to disclosure should be timely and reasoned; there is no place for disclosure "ambushes" or for late or uninformative defence statements. Admissions should be used as far as possible to narrow the real issues in dispute (paragraph 15). A constructive approach to disclosure is a necessary part of professional best practice for the defence and the prosecution (paragraph 16). In complex cases the Court has to be provided with a timetable for disclosure and a disclosure management document prepared by the prosecution is often utilised (paragraph 39). 29. There is no such statutory framework in this jurisdiction and, critically, no obligation upon the defence to file a defence statement identifying the real issues in the case. The process here is governed by the Attorney General's Guidelines which in relation to third party disclosures provides as follows:- "Third Party Disclosures It is NOT the prosecutor's duty to consider whether material may exist in the possession of third parties which may afford some support to the defence. Whilst it is correct that the prosecutor is a minister of justice, it is not for him to do defence counsel's job. In any case where the defence considers that a third party may be in possession of relevant material (e.g. child welfare reports, medical records), it is a matter for the defence to request it from the third party, or, if refused, make application to the Court upon notice to the prosecution and the third party concerned to seek an order for disclosure. It is then a matter in light of the issues in the case, and for the third party to make any representations it wishes to make. However, as a matter of professional prudence, the prosecutor who has reason to suspect that reliable third party material exists which may have a potentially negative bearing on the prosecution case would be wise to enquire whether such material does exist, and what in broad terms the nature of it is. If it has, or may have, an adverse effect on the merits of his case, prosecution counsel would doubtless be well advised to consider its contents carefully and at an early stage. The prosecutor who, for any reason, knows of the existence of such third party material does, if the prosecution should proceed, have a duty to alert the defence to its existence if they are not aware of it." 30. Despite these provisions, Crown Advocate Baker took the

approach that the Crown was under a duty to pursue reasonable lines of inquiry in relation to material held by third parties (as per *Flook*- a decision followed in this jurisdiction, I believe without the matter being argued, even though based upon the CPIA), which he submitted had been done, and that in general terms the Crown should be guided by the process under English law notwithstanding the lack of a similar statutory base, which he said it had been. He suggested that the Attorney General's Guidelines in respect of Third Party Disclosures required revision. 31. As made clear in *Taylor v Law Officers of the Crown* (a decision of the Guernsey Court of Appeal of which Sir Michael Birt, Bailiff, was a member) at paragraph 144:- "In our judgment these criticisms are misconceived. As is clear from the summary of the law which we have described above, the common law imposes certain obligations on prosecution counsel. In the absence of clear indications to the contrary, counsel in England and Crown Advocates here must be expected, and trusted, to carry out their task fairly and conscientiously." 32. The approach of the Defence has been to conduct a most detailed forensic analysis of the disclosure process in order to support its contention that the point has been reached where the Court should no longer have any confidence in the Crown. It is not feasible for me in this judgment to track through each and every part of that detailed exercise. The Crown have provided me with the Disclosure Schedules, a disclosure chronology and a schedule setting out the inquiries made and the results. It is clear that problems have been encountered, what Crown Advocate Baker described as "bumps along the way" , and there may well be disclosure issues that will need to be addressed as part of the on-going trial process but nothing I have read or heard leads me to the conclusion, as invited by the Defence, that I no longer have any confidence in the Crown's ability to discharge its disclosure obligations. 33. It seems to me that rather than seek the assistance of the Court on the disclosure issues, as invited by the Crown in correspondence and by the Court on 7 th November, 2013, (setting aside a day for that purpose) the Defence has sought the assistance of the Court instead in obtaining a stay of the entire prosecution, which involves an attack upon the whole process rather than a resolution of the issues. There is something in what Crown Advocate Baker says that such attrition litigation is of little help to the trial judge in resolving issues for the trial. The Court remains available to assist on any remaining disclosure issues that counsel are unable to resolve between them. 34. Crown Advocate Baker accepted that, with hindsight, the case was not ready for trial on 13 th November, in that relevant material has since been disclosed (much as a consequence of the second complainant bringing to Jersey prior to the trial in November a bag of documents which the police brought to the prosecution for examination on the 11 th November, 2013), but he denied misleading the Court. His statement on 6 th November, 2013, that disclosure had been as thorough and timely as the circumstances permitted was his view at the time. I accept that. I do not find that the Court was misled. 35. A high threshold is rightly required for a finding of prosecutorial misconduct (see *SSHD v CC & CF*

[2013] 1 WLR 2171). I have considered carefully the failures alleged by Advocate Cadin but I do not find prosecutorial misconduct in relation to disclosure and it does not offend my sense of justice and propriety to ask that the defendant be tried. When measured against the seriousness of the charges against the defendant, the balance is plainly in favour of the trial proceeding. 36. Prosecution misconduct relates to the second of the categories set out in Warren . In relation to the first category, it is simply not possible, in view of the Crown's submission that it has complied with its disclosure obligations and in the light of the schedules that have been filed showing what has been done and disclosed, for me to say on the basis of disclosure alone that it would be "impossible" to give the defendant a fair trial. 37. With the benefit of hindsight, a disclosure management document and timetable for disclosure (which I do not believe have been used in this jurisdiction before) in a case such as this involving such historic allegations might have been helpful but for it to be effective, it would require the active co-operation of the defence in identifying the issues and agreeing the third party search parameters. 38. Advocate Cadin raised a further point in his skeleton argument in relation to disclosure, namely that the primary review of Unused Material for the purposes of disclosure had not been undertaken by the police, but by the Crown Advocate, which he said was unlawful and against good practice. It would deprive the defence of the ability to cross-examine the police at trial as to the disclosure process, which would undermine the fairness of the trial process. This submission was not advanced in oral argument, and it is unsupported by authority. Crown Advocate Baker submitted that in a case of any complexity the police and prosecution lawyers necessarily work in conjunction. The practicalities require it and the interests of both prosecution and defence are best served by the process. Plainly, he said, the Crown Advocate has the duty of examining the relevant material in order to apply the principles of disclosure and by way of example, referred to paragraph 142 of Taylor v Guernsey Law Officers:- "142 The instant case was different. It is plain, as we shall see, that the Crown Advocate undertook the duty of examining the relevant material in order to apply principles of disclosure and that, having done so, she concluded that there was no requirement to disclose any of the material or to serve any of it on the Royal Court to enable the court to perform a balancing exercise." 39. I see nothing unlawful or contrary to good practice in the conduct of the Crown Advocate in this respect. 40. Advocate Cadin's submissions on disclosure were made not just on a standalone basis, but in support of separate applications for a stay made in relation to each of the three complainants and I take them in turn. First complainant 41. The issue here relates to the prosecution of the defendant in 1964 and what he was acquitted of. Nine "governing principles" in relation to autrefois were identified by Lord Morris in Connelly v DPP

[1964] A. C.1254 at pages 1305 - 1306. The commentary in Archbold 2014 at paragraph 4-184 in relation to the third principle provides as follows:- "The third principle identified by Lord Morris suggested that the doctrine of autrefois extends to situations where the crime charged is in effect the same or substantially the same as one in respect of which the person charged has previously been acquitted or convicted, or in respect of which he

could on some previous indictment have been convicted. The fourth principle set out the test of whether the evidence necessary to support the second indictment, or whether the facts which constitute the second offence, would have been sufficient to procure a legal conviction upon the first indictment either as to the offence charged or as to an offence of which, on the indictment, the accused could have been found guilty. However, others of their Lordships took the view that the situations encompassed by these two principles fell not within the doctrine of *autrefois*, which gives the accused an absolute right to relief, but relate to the wider, distinct and separate, discretionary power of the court to prevent abuse of its process (see Lord Devlin at pp.1340 and 1358 and Lord Pearce at p. 1364). In *R v Beedie*

[1997] 2 Cr App R 167, the Court of Appeal confirmed that the third and fourth principles identified by Lord Morris relate to the doctrine of abuse of process and not to the doctrine of *autrefois*. For *autrefois* acquit to apply the defendant would have to show that the current charges have the same essential ingredients as the 1964 charges (see *AG-v-Kelly* (1982) JJ 275) but the loss of documentation in relation to the 1964 charges makes that a difficult if not impossible exercise to undertake. This application is therefore rightly brought under the power of the Court to prevent abuse of its process. 42. The only documentation which survives in relation to the 1964 prosecution is as follows:- (i) A front page *Jersey Evening Post* report of 24 th March, 1964:- "Alleged indecent assault on girl A 25 year old Londoner, W, made a brief appearance at the Police court this morning, when he was charged with having committed an indecent assault on a 15 year old girl. At the request of Centenier P. C. Hembest the case was put off until next Tuesday afternoon pending further investigations. An application for bail by the accused was refused and he was remanded in custody." (ii) An article in the *Jersey Evening Post* of 31 st March, 1964:- "Indecent assault charge dismissed. At the Police Court this afternoon a charge against 25 year old W of indecently assaulting a 15 year old girl at a house in Wellington Road between March 7 th and 21 st was dismissed." (iii) An entry in the *Jersey Police Court Register* Volume 33, Entry 215 of 31 st March, 1964:- "W (25) A Committing an indecent assault on the person of X, between 21 st & 22 nd March, 1964. B) On two separate occasions committing an indecent assault on the person of X between 7 th & st March 1964. Discharged all counts". 43. Thus, we have the bare statement of the offence but no particulars of the indecent assaults alleged. Centenier Hembest, who presented the prosecution case, is now deceased, as is the first complainant's mother. The doctor who medically examined the first complainant cannot now be traced. We have no police or medical reports, record of interviews, statement of witnesses, transcripts of evidence given or correspondence with the defence-the defendant cannot remember if he was represented). The defendant said this in interview about these events that took place 50 years ago when he was 25:- "Her mother [E] said that she thought there was something going on. We went to the police court, she [B] was there as a witness and they said if any sexual contact or intercourse had taken part, nothing, and the case was dismissed and she [B] was witness there, B on my behalf at the Police Court that must be on record. "....she

gave err witness, B, and there was no question there was nothing to answer to and nothing had happened ... nothing happened with B until she was 27." "Well we, we were together on the settee, we were sitting there, we were kissing and cuddling she was and then her mother came home from work and through [sic] a brick through the window cause she saw us on the settee. So she went absolutely pear shape, she called the Police Centenier and they put me on remand and they said, what's been going on, so it all went to Court and err B gave witness and exactly what I've told you..." "[When we were on the sofa], I think err we were cuddling and all the rest of it but we never had anything sexually at all." "She [B] was affectionate towards me but that was as far as it ever went, and I mean, we went to Court she stated what happened, the case was dismissed." "... that's what it was, and err the only incident was and I, we went to Court and she had to go up and make a statement and ... we were affectionate together but no sexual intercourse ever happened." "... she was still a virgin when we went to Court. Never touched ... everything as discussed [in court] there was no sex sexual intercourse took part at any time. It was in the statement of the court." "... when she was 16 we went to Court and it was all in the court and it was, she was over 16, she made a statement in the court, she got up to testify and everything else and the Judge weighed it all up and they said no, no case to [answer]". 44. The Defence concede that the defendant's recollection that the first complainant was over 16 at the time was probably incorrect-in March 1964 she was two months short of her 16 th birthday. The first complainant said this in her statement of 4 th April, 2013, at paragraph 21 again in relation to events 50 years ago when she was 15:- "This all stopped when I was about fifteen years old. My mum caught us cuddling on the sofa and she threw a brick through the window. I remember sitting on the sofa hugging. I was cuddled into W when the brick came through the window. He got up to look out the front door thinking it may have been kids but it was mum. She was really angry at me like she blamed me for it all. She tried to attack me, I remember running up the stairs but she dragged me back down and I kicked her in the stomach. She later told me she had miscarried but I don't know if that was as a result of me kicking her in the stomach. I don't remember what W said, I just remember him trying to stop her attacking me. She said that she knew something had been going on and so she called the police. She later told me that she had found the semen on my bed sheets and that was what raised her concerns. She stopped speaking to me after that and I had to move out of the house. I seem to recall that W did spend some time in New Gate Prison, it's not there anymore. He was put in the cells for a couple of days then went to court. I was examined by the police doctor who said we hadn't had sex and I was still a virgin, so he had no case to answer. He was released and when he came out he went back to live with mum. It was in the Jersey Evening Post but my name wasn't mentioned as I was too young." 45. The first complainant said this specifically about the investigation into the defendant in 1964 in her statement of 26 th April, 2013:- "The Police asked me specifically what I remember of the investigation against W in 1964, after Mum caught him with me on the sofa. I really don't remember much about it. I was taken to see the Police Doctor by a Police lady and someone from Social Services, we went to a surgery on the corner of Palmyra Road and Rouge Bouillon. It was a male Doctor but I don't remember his name. I

must have given a statement. I don't remember giving a statement but I must have done because he went to Court. It's all a blank around that time. It must be the trauma of fighting with Mum and everything. It was a long time ago and I was very young. I really don't remember. The Police told me that records show W was charged with committing an indecent assault on me between 21 st and 22 nd March 1964 and also committing an indecent t assault on me on two separate occasions between 7 th and 21 st March 1964. I have no idea why W was charged with these specific dates, I have no recollection of what I told the Police at the time. As I said in my previous statement, I can't be specific about the dates and times that W indecently assaulted me. I can be absolutely sure however that he assaulted me in my bed more than two or three times. It seemed like all the time that Mum was at work he would kiss me and touch me on the sofa. It wasn't all the time that he would come into my bed, that happened once a week or maybe every other week, but certainly a number of times before he was caught in March 1964." 46. Advocate Cadin referred to the case of R v Turner (27 th March 2000). In that case, the appellant had been discharged in August 1986 for one charge of indecent assault against the complainant C committed in a car. Some twelve years later, allegations re-surfaced and the defendant was put on trial for a number of serious sexual offences (rape, buggery, false imprisonment and assault occasioning actual bodily harm) involving C, which would have happened before August 1986. C said she had complained of these matters in 1986 which the relevant documents (witness statements, police reports, record of interviews and correspondence with the defence) would have made clear, but all of these documents had been routinely destroyed by the police. C had been called upon by the police to "redo" her statement. The English Court of Appeal said this at paragraph 19:- "19 It is difficult to reconcile C's evidence of what she complained of to the police in 1985-1986 with what we know. We know that the appellant was charged with one offence of indecent assault, and that was withdrawn on 12 August 1986. This suggests either that she did not then complain to the police of any of those other matters, or she did and they did not believe her. The documents would have made this clear, and the police have destroyed these documents. That does not seem to us to result in a neutral "we must do our best with the remaining evidence" conclusion, but to raise the twin possibilities of serious prejudice to the defence, and positive benefit to the prosecution. It was clearly important for the appellant to know what had been said to the police, what he had said, and more importantly, what others - and in particular Complainant C, had said. For instance, it was his recollection that he was not asked about the lorry incident, and if the witness was complaining of rape, it would be remarkable to omit this incident. There was an evidential hole at the heart of the case which was caused by police action, and which could not be repaired by judicial case management. As Mr Grunwald QC for the appellant submitted, it gave C a free hand to say what she wished, confident that she could not be corrected by the 1985-1986 documents. Those documents would have been central to the case, and a trial without them could not be as fair as a trial with them." 47. Advocate Cadin submits that there is similarly an evidential hole in the heart of the case involving the first complainant. It is grossly unfair, he said, for the defendant to have to face a trial process when he is completely unable,

through a lack of contemporaneous records, to substantiate his own position or test the Crown's evidence (and the first complainant in particular) without the existence of the relevant material. 48. Crown Advocate Baker said that it was clear from the interviews that what was complained about in 1964 related to kissing and cuddling on the sofa in the period specified and there was no evidence of the broader allegations that were now being made. The position was in fact favourable to the Defence in that the defendant was in a strong position to cross-examine the first complainant to the effect that she did not make the allegations then that she is making now. The Court could infer from what we know that nothing else was alleged. The loss of records did not prevent a fair trial as there was cogent room for cross-examination. Unlike the case of Turner, the Crown had not invited the first complainant to "redo" her statement if one was made in 1964. In Turner the appellant was facing the same allegations twice and it was therefore necessary for him to test the differences in the accounts. The first complainant is not doing this. It was common ground that in 1964 the first complainant did not make a complaint (it would seem that it was the mother) and the Crown are not in a position to contradict the defendant's evidence as to what took place during the trial which the defendant must be able to remember, notwithstanding the years that have passed by. 49. The suggestion by Crown Advocate Baker that the prosecution in 1964 concerned only kissing and cuddling with no evidence of broader allegations made is gainsaid by the following:- (i) The first complainant being medically examined as to whether or not sexual intercourse had taken place. I agree with Advocate Cadin that this suggests that much more serious allegations were being investigated. (ii) The first complainant's statement that the mother had found semen on her bed sheets which is consistent with the more serious of the allegations now being made by the first complainant. 50. The position in this case is not on all fours with that of Turner. There was no question in that case that the one charge for which the defendant had been discharged extended to the other more serious and clearly quite distinct charges he was later facing. A potentially crucial plank in his defence would be any discrepancies between what C alleged then and subsequently twelve years later. 51. In this case, the first complainant would appear to have supported the defendant in denying whatever accusations were made against him, effectively at the instance of the mother, but even so, destruction of any statement she may have made or a record of any interview or evidence she may have given, still deprives the defendant of any ability to explore discrepancies between what she was saying then and now. 52. More significant in my view is the inability now to be clear as to the criminality covered by the 1964 charges. Contrary to what Crown Advocate Baker says, it would seem that the mother did suspect the more serious conduct of which the first complainant is now making complaint. Centenier Hembest appeared to do so as he arranged for the first complainant to be medically examined as to whether sexual intercourse had taken place and resisted the defendant's bail application. The Crown relies wholly on the dates mentioned in the unparticularised charges but, as Advocate Cadin says, we do not know how the case was put, what those dates represented and whether they were samples of a course of conduct prior to March 1964. The defendant's own recollection seems to have been of a broad inquiry into much more than

just kissing and cuddling. As the defence not unreasonably assert, how can we be certain today what the defendant was actually acquitted of in 1964 without the documents that have now been lost or destroyed? 53. Archbold at paragraph 4-88 on situations akin to *autrefois* says this:- "It is the facts as they existed to the knowledge of the prosecutor when the first proceedings were concluded that are relevant; at any time up to that moment the offender's known culpability could have been covered by including further charges, and if that culpability embraces further offences committed on other occasions which are not charged, ordinarily they should be taken into consideration: *R v Dwyer*

[2012] 2 Archbold Review 1, CA (where the defendant had been sentenced for a single offence of possession of drugs with intent to supply on the basis of admitted regular dealing over a period of six months, a subsequent prosecution for conspiracy to supply drugs reflecting that dealing was oppressive and could not be justified by the fact that an exceptional sentence had been passed in the first proceedings)." 54. The problem here is that with the destruction or loss of records and the exceptional lapse of time it is not possible to determine what facts were known to Centenier Hembest and how the prosecution case was framed and put to the Court. Conducting the very unsatisfactory exercise of relying on what little documentation we have and the memory of two witnesses as to what happened 50 years ago, there is a very real possibility in my view that the two sets of charges do cover the same criminality and are based substantially on the same facts. 55. That potential unfairness is not something that can be cured by directions to the Jurats. It goes to the heart of the prosecution. I have concluded that for these reasons there cannot be a fair trial of the allegations made by the first complainant comprised in Counts 1-6 inclusive and will grant the defendant's application for a stay in respect of those counts. Second complainant 56. The Defence have obtained a report from Professor Hirsch, dated 12 th February, 2014, which expresses the opinion that the second complainant is suffering from somatisation disorder, a condition in which the patient has multiple somatic complaints that cannot be fully explained by any known general condition or the direct effects of a substance. He describes it as a disorder which reflects a disturbance of mind in which the patient generates falsely based medical complaints. By definition, patients suffering from this condition cannot be regarded as reliable historians. He concludes that absent any independent evidence of her having been sexually assaulted by the defendant, he did not think that her evidence could be considered reliable. 57. Advocate Cadin questioned how a decision could have been taken to charge the defendant in relation to the second complainant without first undertaking a full evaluation of her credibility which he said had clearly not been done. 58. There was still significant missing material, he said, including, for example:- (i) material relating to various television interviews; (ii) medical records; (iii) mental health and counselling records; (iv) social Service files; and (v) all records of contact between the police and the second complainant. The Crown, he said, appeared not only to have done nothing about this, but was content not to pursue these enquiries. 59. Crown Advocate Baker responds that credibility is a matter for the tribunal of fact, and I agree. In terms of disclosure he referred to the test of relevance as set out in

The Attorney General's Guidelines and the right to privacy. The inquiries that have been made and their results are now set out in a schedule. What is disclosable, he said, has been disclosed. In relation to for example counselling records, he states that it is an ongoing process in disclosure, which is a continuing duty, and further disclosure will be made if anything disclosable is identified. 60. Whilst there may remain issues on disclosure which counsel through discussion and admissions cannot resolve without the intervention of the Court, we are not in the territory of abuse of process here and I decline the defendant's application in relation to the complaints brought by the second complainant comprising Counts 7 - 12 of the Indictment. The third complainant 61. The third complainant says she made her complaint as a consequence of her own daughter D alleging that she too had been sexually abused by the defendant. D subsequently posted an entry on Facebook the gist of which was:- "Mum, just take a look at yourself. Raped by your father then you let him into your daughter's life." D has serious mental health issues and the Crown have decided not to proceed with her own complaints against the defendant. 62. The difficulty that faces the Defence, says Advocate Cadin, is that any cross-examination of the third complainant as to why she complained when she did would inevitably bring to light D's complaint, which he says would be grossly prejudicial to the defendant's case. 63. Advocate Cadin relied on the case of *R v J. A. K.*

[1992] Crim. L. R. 30. In that case, the appellant had been charged with sexual offences against his younger sister and his daughter. Separate trials were ordered. The prosecution elected to try the offences relating to the daughter first and the appellant was acquitted. The allegations made by the sister had not been reported by her until she was emboldened to do so by hearing of the complaints made by the daughter. In the very short report in the Criminal Law Review of the judgement of Ognell J it was held:- "Held, allowing the application and staying further proceedings on the Indictment. It was not possible to reconcile the approach in *L. P. B. (1991) 91 Cr. App. R 359*, where Judge J. had refused a similar application, with that of the Divisional Court in *R v Telford Justices*, ex

p. Badham

[1991] 2 W. L. R. 866. In *L. P. B.* the Court had focused attention on the justification for the delay, namely understandable reticence on the part of a victim of sexual abuse within the home, and finding that to be reasonable had declined to stay the Indictment. The correct test was that enunciated in the *Telford Justices* case, namely whether a fair trial would be possible. In the instant case the period of delay of itself, and the agreed absence of any evidence capable of corroborating the complaint, led to an inference that a fair trial would be impossible. In addition, the defence would be unable to explore the reasons for the complainant's delay in making her allegation without the circumstances of the daughter's allegations being adduced in evidence and thus the jury would be denied the opportunity of evaluating her explanation for the delay." He concluded that the fairness of the trial had been so seriously eroded that it would be oppressive for the prosecution to be allowed to proceed. 64. Advocate Cadin submitted that aside from the additional aggravating feature

of disclosure that case is on all fours with the present case in relation to the third complainant. *R v J. A. K.* had been considered on a number of occasions by the higher courts in England (including *R v F(S)*) and had not been specifically disapproved or overruled. Whilst it remained a first instance decision, it is nonetheless persuasive, he said, for two reasons:- (i) Firstly, the trial judge (Ognell J) was a very experienced and highly respected criminal judge. (ii) Secondly, the fact that it had been considered on a number of occasions by the higher courts and not overruled or disapproved is an indication that it was a sound decision, having regard to the specific

facts.

65. He submitted that there was, in the circumstances, no proper basis for departing from that decision in principle, having regard to the similarities. 66. In his skeleton argument, Crown Advocate Baker said that the position of the third complainant was different in that she had put forward another reason for the timing of her complaint, namely that she had found her real father and that she could therefore be examined by both the Prosecution and the Defence about the delay in making the complaint without the need for any reference to D. In discussion he accepted that D's complaint did appear to be central to her decision to make her own complaint and that it would not be possible for her to answer questions on the issue without referring to D's complaint. Even so, Crown Advocate Baker submitted that the reference to D's complaint would not necessarily be that prejudicial, bearing in mind the admissions the Crown had made as to her mental health problems. It was not unusual, he said, for defence counsel to have to deal with tricky points of evidence and there were a number of options he put forward:- (i) The third complainant could be asked not to mention what D had told her in response to questions put to her about the delay. In my view that would not be fair to the third complainant, as it is clear that her daughter's complaint played a central role. (ii) She could be encouraged to say that she had made her complaints because of discovering her real father. The difficulty again is that it is clear that this was not the central reason and she would be bound to mention D's complaint if she is to give truthful evidence on the issue. (iii) She could not be asked about the delay at all. Why a complaint has been made so long after the event is of course the first question any tribunal of fact will want to know and as pointed out in *Turner* at paragraph 31 speculation may be difficult to avoid. 67. There may be other ways of addressing the matter, but Crown Advocate Baker submitted that the issue could be explored by the defence with the Crown and the prejudicial effect mitigated with an appropriate direction to the Jurats. It cannot be the case, he said, that a decision not to prosecute in respect of one person should inevitably have a domino effect so as to preclude a prosecution in respect of another complainant on completely different evidence. 68. Advocate Cadin was not attracted to emphasising D's mental health problems as there were aspects of the statements that she had made upon which the defence wished to rely in the cross examination of the third complainant. 69. The discussion proceeded on the basis that the explanation for the delay does not form part of the Crown's case and it is a question therefore for the defence as to whether it explores the

same in cross examination. In my view, R v J. A. K. was centrally concerned with delay and the absence of corroboration - the warning in respect of which is no longer a requirement. The inability of the Defence to explore delay was an additional factor that added to the erosion of the fairness of the trial. It is a case based on its own facts and which does not establish any principle of law. The law on delay is now set out in the Court of Appeal decision in R v F(S) to which I referred above. 70. In my view, the fact that cross-examination by the defence on the issue of delay may give rise to answers which are prejudicial to the defendant does not of itself render a fair trial impossible. It is clear that the Crown are willing to assist the defence in minimising the extent of any prejudice as is the Court through the giving of appropriate directions. The defendant already faces an indictment where there are (now) two complainants. Directions will be given on the extent to which the evidence of one complainant can be used to support the evidence of the other (cross admissibility - an issue not apparently discussed as yet between counsel). If D's complaint is received into evidence, then the Jurats will be given directions as to the use to which that evidence can be put. 71. The criminal justice system has to protect both victims of sexual abuse and defendants but it cannot be right that no historic complaint of sexual abuse can proceed where (without more) the explanation the complainant will give, if asked, about the delay will prejudice the defendant. 72. It is difficult for me to assess at this stage, disclosure being an on-going process, the extent to which the Defence will have other material to cross-examine the third complainant. I am aware of the reference made in R v F(TB)

[2011] 2 Cr App R 13 to the appellant in that case being left with no material to cross-examine the complainant, leaving the jury with just the complaint and the denial. However as made clear in R v F(S) I must guard against eliding the two features of the trial process namely an application for stay for abuse of process and a submission of no case. 73. A further point was raised by Mr Cadin as to the amount of time the third complainant appears to have spent in the company of police officers but to the extent that this impacts upon her credibility as a witness this is a matter to be explored in evidence. 74. Having taken into account Mr Cadin's underlying submission in relation to disclosure, I decline, to stay the proceedings in relation to the complaints of the third complainant comprised in counts 13 to 18. Exclusion of evidence 75. In the event of the Court declining to stay the proceedings in relation to the second complainant, the defendant applies for her evidence to be excluded under Article 76 of the Police Procedures and Criminal Evidence (Jersey) Law 2003 . Count 12, containing a count of rape in 1974, was the most serious allegation on the indictment. It is forty years old and Advocate Cadin submits that there is no independent evidence in relation to it, or indeed any of the other counts. According to Professor Hirsch, the evidence of the second complainant cannot be relied upon and moreover she has lied previously, including to the extent of making a false allegation of rape and repeatedly. Her evidence is likely to take up the greatest amount of Court time and given the torrid nature of her evidence cannot but influence the Court about the counts concerning the other complainants. In the circumstances, Advocate Cadin submits that its prejudicial impact will far outweigh its probative value and it ought to be excluded. 76. I reject this application

which, if successful, would bring the prosecution in relation to the second complainant to as close as there would be no complainant. As Crown Advocate Baker says, credibility is a matter for determination by the tribunal of fact, not by an expert witness. The lack of corroboration is not a bar to the prosecution proceeding. Even when it was a requirement to give a warning about uncorroborated evidence, it was permissible for a jury, duly warned, to convict on the uncorroborated testimony of the complainant. 77. In summary:- (i) I grant the defendant's application for a stay of the proceedings in relation to Counts 1-6 inclusive. (ii) I refuse the defendant's application for a stay in relation to the remaining counts and for the exclusion of the evidence of the second complainant. Authorities Attorney General-v-Steel and Powell

[2003] JRC 172B . Warren-v-Attorney General

[2011] JLR 424 . R v F(S)

[2011] EWCA Crim 1844 . Attorney General's Reference No 1 of 1990 [1992] 1 QB 630. R v Stephen Paul S

[2006] EWCA Crim 756 . R v Frank Joynton

[2008] EWCA Crim 3049 . R v Flook

[2010] 1 Cr App R 30 . Syvret-v-AG

[2011] JRC 060A . Attorney General-v-H

[2012] JRC 175 . Taylor v Guernsey Law Officers of the Crown GLR 2007/8. Criminal Procedure and Investigations Act 1996. CPIA Code of Practice. Attorney General's Guidelines on Disclosure 2013. The Judicial Protocol on the Disclosure of Unused Material in Criminal Cases (December 2013). SSHD v CC &CF

[2013] 1 WLR 2171 . Connelly v DPP [1964] A. C.1254. Archbold 2014. AG-v-Kelly

(1982) JJ 275. R v Turner (27th March 2000). R v J. A. K. [1992] Crim. L. R. 30. R v F(TB)

[2011] 2 Cr App R 13 . Police Procedures and Criminal Evidence (Jersey) Law 2003. Page Last Updated: 18 Jan 2017 BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII

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