

JERSEY / JUDGMENT

AG -v- W [2017] JRC 111A (18 July 2017)

[2017] JRC 111A

Source: bailii.org · Research copy typeset by Esheria. Not court-issued or certified.

JUDGMENT

THE DEPUTY BAILIFF: 1. This is an interlocutory hearing in the prosecution against W ("the defendant") which is to start on 24 th July, 2017. 2. The applications before me are firstly, for the Court to permit certain evidence to be adduced by the defence and for the complainant to be cross examined on it and, secondly, by the Crown for the use of screens. 3. The defendant faces 13 charges of sexual offences allegedly committed against the complainant between 1997 and 2003, when she was aged between 9 and 16 years. The charges include indecent assault, procuring acts of gross indecency, rape and an alternative allegation of unlawful sexual intercourse. The offences were said by the Crown to have occurred at the homes of the defendant and, in very general terms, the Crown asserts that over a period of five to six years the complainant habitually stayed at the homes of the defendant, and the alleged offences began with regular instances of digital vaginal penetration and evolved into procuring that she masturbate the defendant and then to rape. The defendant denies all of these charges and claims that this is an invention on the complainant's part. The issue of credibility both of the complainant and of the defendant is therefore a central issue in this case. 4. As part of the disclosure in this case the defence has been provided with extracts of the complainant's records kept with Health and Social Services (HSS) and on considering these records together with the complainant's witness statement and police records wishes to deploy in evidence at trial either by admissions or cross examination the following:- (i) Evidence of the fact that the complainant had counselling sessions with HSS on the topic of sexual activity. The defence wish to refer to this to establish that the complainant has told a lie and/or to establish that she had an opportunity to make a complaint relating to the defendant's alleged sexual offending but did not do so; (ii) Evidence of the fact that the complainant attended the Brook Clinic seeking a morning after pill because she had had unprotected sex and did not want to become pregnant; (iii) Evidence of the fact that the complainant had made allegations of sexual assault against four other persons that were or may be false. 5. As deployment of this evidence and cross examination of the complainant on these matters may well involve disclosure of the complainant's sexual history in general, the leave of the Court has been sought. Legal principles 6. Guidance on this topic is to be found in the judgment of Sir Michael Birt, Commissioner, in the case of AG-v-Correia

- [2015] JRC 061A in which, in considering the circumstances in which a complainant may be asked or evidence may be given about her previous sexual history, at paragraph 39 the Commissioner says:- "Doing the best I can, I would summarise the correct approach as follows: (i) In a prosecution for rape, evidence that the complainant has engaged in consensual sexual conduct with persons other than the defendant is not admissible to support the inference that a person who has previously engaged in consensual sexual conduct is for that reason less worthy of belief as a witness i.e. that it affects her credibility. (ii) Such evidence is similarly not admissible to support the inference that a person who has previously engaged in consensual sexual conduct with other persons is for that reason alone more likely to have consented to the sexual conduct at issue in the trial. (iii) Evidence of consensual conduct on the part of the complainant with persons other than the accused may, however, be admissible for other purposes. (iv) By way of illustration only, and not by way of limitation, the following are examples of admissible evidence: (a) Evidence of specific instances of sexual conduct tending to prove that a person other than the defendant caused the physical consequences of the rape alleged by the prosecution; (b) Evidence of sexual conduct tending to prove bias or motive to fabricate on the part of the complainant; (c) Evidence of prior sexual conduct, known to the defendant at the time of the charge, tending to prove that the defendant believe that the complainant was consenting to the act charged; (d) Evidence of a pattern of sexual conduct so distinctive and so closely resembling the defendant's version of the alleged encounter with the complainant as to tend to prove that the complainant consented to the act charged or behaved in such a manner as to leave the defendant to believe that the complainant consented; (e) Evidence tending to rebut proof introduced by the prosecution regarding the complainant's sexual conduct; (f) Evidence that the complainant has made a false allegation of rape." 7. Further guidance in connection with the making of a false allegation of rape is to be found in Regina-v-AM
- [2009] EWCA Crim 618 where at paragraph 21 et seq. Dyson LJ said as follows:- "21. As we have said, it is now clearly established that evidence or questions about complaints of sexual assaults which are said to be false are not about any sexual behaviour of the complainant within the meaning of Section 42(1)(c) (see, for example, BT, to which we have already made reference). But in order to avoid possible abuse, the judge should not regard such evidence or questions as being about a previous false complaint, (rather than about the complainant's sexual behaviour) unless there was a proper evidential basis for asserting that the previous complaint was made and was untrue.
22. The difficulty lies in what constitutes a proper evidential basis. In our judgment, it is less than a strong factual foundation for concluding that the previous complaint was false. But there must be some material from which it could be properly concluded that the complaint was false. In Garaxo at paragraph 14, this Court considered that there was a proper evidential basis if there was material such that, depending on the answers given by the complainant in cross examination, the jury could have been satisfied that the previous complaint was untrue, although it was material which was capable of founding an inference

that the complaint was untrue.

23. In applying this test we do not think the judges will be assisted by an examination of the facts of other cases (such as in the present case the facts of *Garaxo*). The exercise which a judge is called on to perform is fact sensitive. At one extreme will be cases where a previous complaint was obviously untrue, for example where the complainant admits that it was untrue and the withdrawal is manifestly reliable. It would be absurd if that evidence could not be adduced by the defendant or the subject of cross examination on the grounds that it was about previous sexual behaviour. The other extreme is the case where the defendant suggests in cross examination that a previous allegation by the complainant of a sexual offence against a third party is untrue where there is overwhelming evidence that it is true. Most cases are likely to fall between these two extremes. It would be a matter for the judge to decide on which side of the line any particular case falls. It is not an exercise of discretion. Rather it is a matter for the judge to evaluate the basis of all the relevant material. But, as is common ground in this case, the relevant question is whether that material is capable of leading to a conclusion that the previous complaint was false." 8. The first category set out at 4(a) above covers those records which show that the complainant had counselling sessions with HSS during which sexual matters were explored and discussed. The desire to make reference to these meetings and to cross examine on them is, so the defence puts it, not to make any reference about the complainant's previous sexual activity with men (which would be prohibited by *Correia*) but rather to explore why the complainant did not mention the alleged assaults or complain about them during those meetings and counselling sessions when she obviously had the opportunity in a secure environment to do so. 9. The Crown for its part does not oppose the defence's wish to cross examine the complainant about her failure to make a complaint about the alleged activities of the defendant at a time when she could have done so. 10. I agree. Exploring the reason why the complainant did not make complaints on earlier occasions even though she had a number of opportunities to do so during the period when the alleged sexual assaults were taking place, is a proper area for cross examination and is not of itself directly touching upon the complainant's sexual history. However, it is obviously important that those questions do not intrude into the area of the complainant's sexual history and in my view the matter can and should be dealt with by appropriately worded admissions as to the fact of these meetings, their dates, those in attendance, the fact that they were private meetings, their duration if known and the fact that the complainant did not make any complaints to the professionals at the various meetings about the alleged sexual assaults of the defendant. 11. Accordingly counsel should prepare the appropriate admissions. If the form of such admissions cannot be agreed then I will sit briefly to make further orders and directions in this matter. 12. The second category (paragraph 4(b) above) on which the defence wishes to cross examine the complainant and put in documentary proof is the fact that on one occasion she attended Brook Street for the morning after pill to avoid pregnancy. The defence do not, however, pursue that application at this point because it had recently received further disclosure from the Crown which may well explain that the complainant, in

order to regularise her periods, had received prescribed oral contraception which she took for some time but was not taking it during the period that she attended Brook Street. The defence reserves the right to make a further application once it has considered that disclosure. 13. To the extent that the defence wish to cross examine the complainant and suggest to her that she lied during various meetings when her mother was present by denying that she was sexually active, when she appears to have admitted such activity when she was not in the presence of her mother, that would not be, to my mind, a proper area of cross examination. 14. Firstly cross examination of this nature must inevitably be to the effect that the complainant was sexually active but was prepared to lie to her mother about it. This it seems to me squarely trespasses on the area of the complainant's sexual activity with men other than the defendant and is within the prohibition contained in *Correia*. In any event it does not seem to me that establishing that the complainant may have been less than entirely frank with her mother would necessarily assist the defence's case or be probative in relation to her credibility in other matters. 15. The third category (paragraph 4(c) above) of documentation and cross examination is that of previous allegations made by the complainant against persons other than the defendant that were false. As said in *R-v-AM* (above), if a complainant has made an allegation of rape against a third party and that allegation is false then it falls outside the guidelines of *Correia* and is a proper matter for cross examination. The rationale behind this is that a false allegation cannot be a reference to the complaint's previous sexual conduct but rather is a matter that may go to whether or not she should be believed in the instant case. 16. It is also apparent from *R-v-AM* that there must be some material on which a judge of fact could conclude that the complaint against a person other than the defendant was false. That assessment is fact specific to every case and is a matter for the judge. 17. It would seem that there are four allegations of abuse or rape made by the complainant that relate to persons other than the defendant:- (i) The first is an allegation made against Person 1 who is the complainant's mother's ex-boyfriend; (ii) The second is an allegation against Person 2, who was the defendant's lodger; (iii) The third is an allegation against Person 3; and (iv) The fourth is an allegation of rape against Person 4. 18. The allegation against Person 1 can be dealt with briefly. In her statement to the police of the 23rd March, 2016, the complainant says at paragraph 3:- "During these meetings I said that I had been abused by various different men. I do not recall saying this however. If I had of said it, it would have been because I was crying out for help. I would have wanted someone to help me but was stubborn and confused and had no one really to turn to. 4. In addition, there was a mention of a man called Person 1 who was one of my mum's boyfriends. I was abused by him which at the time was dealt with by my mum and my sister. I do not want to mention anything further about Person 1 in this statement." 19. There does not seem to me, and I think it is conceded by the defence, that there is any proper evidential basis for the view that the allegation against Person 1 is false. Accordingly this does not fall into the category of false allegations. In the event that I were to permit cross-examination of the complainant about this it seems to me inevitable that that cross-examination would deal with the fact that there was some form of sexual relationship albeit abusive or otherwise between Person 1 and the complainant and this would speak to the complainant's previous

sexual history which would be prevented by Correia . Accordingly I do not permit any questions to be raised in relation to Person 1. 20. One of the other allegations relates to Person 2 and it seems clear that the allegations against him which appear to be within the category of claims dealt with in paragraph 3 of the complainant's statement of 23 rd March, 2016, as a " cry for help ", are false. 21. Accordingly, and the Crown accepts this, it is proper for the defence to cross-examine the complainant to the effect that whilst she felt able to make false allegations during the period covered by the alleged abuse by the defendant, she did not make any allegations in relation to the defendant himself. This is a proper subject of cross examination and does not relate to the complainant's previous sexual history. 22. The defence may wish to deal with that cross-examination by reference to a number of excerpts from documents in which such allegations are made. In my view, the fact that such allegations were made, the occasions on which they were made, the persons who were present when they were made, the terms in which they were made, and the nature of the meeting in which they were made should be reduced to clear admissions on which the defence may cross-examine the complainant. In my view, for individual documents to be put to the complainant one by one and identical questions asked would be unnecessarily burdensome and oppressive and it seems to me that the defence case in this area would be equally strong by cross-examination on the basis of an admission. 23. Accordingly I direct that the matter should be dealt with by way of admissions. If the terms of admissions cannot be agreed then I will sit to deal with that matter as well. 24. With regard to the allegation in relation to Person 3 as far as I am informed this appears simply in a memorandum disclosed from the HSS record from Mr A to "JG" of the 6 th February 2002. It deals firstly with the allegation in relation to Person 1 and that is a record of a conversation that Mr A had with the complainant. Then there is a note at the end in the following terms:- "NB - spoke to AB she recalls complainant making a similar accusation about one of the Persons 3?" 25. I am not aware of any other reference to Person 3 and I do not think that this single reference can be admissible in the trial. Firstly it is on its face a hearsay statement, secondly it is vague and thirdly it ends with a question mark which to my mind speaks to uncertainty either on the part of Mr A as to adding it in or on the part of "AB" in recording the statement. It is not clear why it is put in the form of a question. 26. In any event for those reasons I do not think that this statement would be admissible and I do not allow any questions to be put in connection with it. 27. The final individual in respect of whom an allegation of rape was made was Person 4, the complainant's boyfriend. This allegation was made in August 2009, significantly after the last allegation against the defendant which related to an alleged offence in 2003. 28. This is not an allegation that the complainant has withdrawn nor has she accepted that it was false. The police, following investigation, did not proceed with the matter. The defence rely on the contents of the police report and the concerns and queries raised within the police report relating to the evidence and the reliability of the complainant as a witness to establish a sufficient basis for me to hold that there was sufficient evidence to conclude that the allegation of rape was false. Accordingly, so the defence argued, that allegation would fall outside the parameters of Correia and the defence would be free to put this false allegation to the complainant. 29. On the assumption, that seems likely, that the

complainant would maintain that her allegations against Person 4 were true, without calling Person 4 himself it is unlikely that the defence could reach the evidentiary position whereby a jury could be satisfied that the allegations were not true. The defence in fact rely upon a number of circumstantial matters or contradictions between the complainant's evidence and the facts, so the police report asserts, as established by the investigation. 30. I set out these matters as follows:- (i) It was alleged by the complainant that Person 4 had raped her in a bedroom which was adjacent to that occupied by his parents. The evidence was that his parents were present at the house and noticed nothing. The police report noted that Person 4's mother was asleep next door and she described herself as a "light sleeper" and that she heard nothing. A similar statement was recorded from Person 4's father. It was however no part of the complaint made by the complainant that she shouted or screamed or there was noise. The most that she said was that she "told him to get off" but he threatened to tell her mother about something personal that she was unaware of. She didn't scream or hit him back but claimed she spoke in a "loud voice" telling him to stop and she let him "finish what he was doing" as she believed he would beat her up if she stopped him. That of itself would not in my view give a sufficient basis for determining that the allegation was false. (ii) The complainant had initially, so the defence contend, told the police that she had not been raped. As I read the documentation the complainant initially told the police that she had been hit and said nothing about being raped which she subscribed to embarrassment. She only mentioned rape when a medical examination lead to the removal of a tampon from high within her vagina which she said was there because she had been forced to have sex. Again I do not think that this of itself would be sufficient to conclude that there was a basis for saying the allegation was false. (iii) She told the police that she had not contacted or spoken to Person 4 on 20 th August, after the rape whereas in fact she had deleted seven text messages to him that day asking him to call her. The complainant's statement on that point was that she had forgotten about the text messages. (iv) The room was not in a state of upheaval. In her statement she says that the room was untidy and you could see where Person 4 had been sleeping on the bed but there was no statement of upheaval nor does she suggest that the rape was violent or that there would have been the signs of a struggle. (v) The complainant's earrings were left in Person 4's room and had been looped together. That, it is suggested, does not support an allegation that she had been raped but rather she had removed the earrings. To my mind that alone cannot be evidence of a false allegation and indeed Person 4 himself could have looped the earrings together after the event. (vi) The complainant alleged that she had been made a hot drink by Person 4 which she had not drunk. It is clear that a teacup had been found which was empty at the time of the search. This it seems to me is a very minor matter and certainly does not by itself indicate a false allegation. (vii) It does not seem to me that a failure to make an immediate disclosure of rape necessarily amounts to evidence that the allegation is false. As the complainant explained in her witness statement she did not make the allegation of rape because she was ashamed and only did so when she was in a medical situation that required her to explain why a tampon was lodged in her vagina. 31. As I have already indicated it does not seem to me that any of these matters raised by the defence could by themselves amount to a

sufficient basis for concluding that the allegation was false. Should I then look at the matters as a whole? If I do so, it still does not seem to me that these matters taken together necessarily point to the allegation of rape being false. In my view taken individually or together there is not a sufficient evidential basis to reach a conclusion that the allegation of rape was a false one and accordingly this area of the evidence falls within the parameters of Correia and there should be no questioning on it. 32. I should probably note at this point that the police report does not, in my view, constitute admissible evidence as to the truth of its contents. It is a document that is hearsay. Screens 33. I was also asked to order that screens be erected at the request of both the complainant and, indeed the co-complainant who alleges one incident of indecent assault against the defendant. 34. The application for screens in sexual matters has become almost routine in this jurisdiction and it is almost inevitably ordered. 35. What is somewhat unusual in this case is that screens are generally ordered to block a direct sight between the complainant and the defendant. Here, however, the complainants wish to be screened from members of the public when they give their evidence and not from the defendant. 36. The reason that the complainants seek screens in this way is contained within a statement filed by the complainant in support of this application. She says " I know there are going to be a lot of family members in court. I know they know who I am but I don't want them to be able to see me whilst I am giving evidence. I don't want them staring at me; watching me as it will distract me. I will feel they are judging me and it will make me feel uncomfortable to talk about what happened to me. My family do not know what happened to me as I have not told them." 37. The complainant also goes on to say that she wishes to have her identity protected and she expresses the view that she will not give her best evidence if she feels intimidated by doing so in front of the public. 38. The defence resist this application for screens on the basis that there is no medical evidence in support of the application relating to distress or otherwise and there is no proper basis for the Court to order screens in such a case. 39. I am informed by the Crown that screens when sought and granted in trials in England and Wales habitually not only block the defence from sight of the complainant but also the members of public. 40. The Crown refers to the judgment of the Bailiff in the case of AG-v-Irving

[2017] JRC 055 . In paragraph 2 of the judgment the Bailiff says this:- "I have considered that the world has moved on even since 2005. In sexual offence cases the court can start from the premise that the complainant, if there is any truth in the complaint, will be emotionally distressed by what took place and there is a strong public interest in ensuring that he or she is put in the best personal position to give that evidence and if that involves screening the witness from the defendant that would be ordered." And then, at paragraph 4:- "Now I should add that in this particular case, the fact that the complainant does say in her witness statement that she is "really nervous and emotional at the thought of", the defendant, "looking at her whilst she gives evidence" and she "doesn't want anyone who doesn't need to see her to see her in court". So it seems to me for those reasons too a screen should be ordered." 41. Of course I well understand the value of screens to block a complainant's sight of the defendant. That is often essential to enable the complainant to

feel comfortable or safe enough to give evidence. 42. It seems to me that what is important is that the complainant is placed in the best possible position to provide her evidence in a way that is compatible with the defendant's absolute right to a fair trial. In sexual cases, of course, victims cannot be identified or named in any publication outside of the court. Thus, this is already a qualification, by virtue of statute, to the openness and transparency which is normally inherent in a trial process to protect the identity of a complainant. On the basis of what I have read in the complainant's statement it does not seem to me to be stretching the inherent jurisdiction of the court too far to direct that screens be erected to protect the complainant (and indeed her co-complainant) from the view of the general public whilst evidence is being given and I so order. Authorities AG-v-Correia

[2015] JRC 061A . Regina-v-AM

[2009] EWCA Crim 618 . AG-v-Irving

[2017] JRC 055 . Page Last Updated: 02 Oct 2017 BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bailii.org/je/cases/UR/2017/>

CASE PAGE <https://chat.esheria.ai/case-law/jersey/ag-v-w-2017-jrc-111a-18-july-2017>

Prepared on 22 October 2026 · Esheria