

JERSEY / JUDGMENT

AG v W [2024] JRC 023 (26 January 2024)

[2024] JRC 023

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JUDGMENT

THE BAILIFF: 1. W ("the Defendant") is to stand trial before the Royal Court on [redacted] with a time estimate of three days on one charge of grave and criminal assault on B ("the Complainant") on 11 March 2023. 2. There are two applications before me. The first is an application by the Crown to adduce evidence of the Defendant's bad character. The second is an application by the Defendant to adduce bad character evidence relating to the Complainant.

Background

3. In brief, the Crown's case is that the Complainant was walking in the early hours of the morning of [redacted] from [redacted]. He saw the Defendant and another male fighting on the floor and he had run over and tried to break up the fight by pulling the two males away from each other. They nonetheless resumed fighting and he again intervened at which time he was punched by the Defendant's closed fist a number of times to the face. He briefly lost consciousness and when he came to he was being kicked in the lower back by the Defendant. 4. There is some CCTV footage and the Complainant suffered some injuries to his face and back. 5. The Defendant's case is that he was acting at all times, insofar as the Complainant was concerned, in self-defence. He had been play fighting with a friend when he was tackled by the Complainant with whom he then scuffled. He did not know the Complainant, but the Defendant alleged that the Complainant said "I'm going to kill you" and the Defendant struck out to defend himself in anticipation of imminent violence. He admits that he kicked him whilst on the ground because it looked like he was reaching for some kind of weapon. The Defendant's bad character 6. The Defendant has a number of previous convictions but in particular the Crown applies to adduce evidence relating to the following convictions: (i) Causing a breach of the peace by fighting on 18 March 2023 which occurred shortly after the index offence. This too involved the Defendant along with another male throwing punches at one another and the incident was captured on CCTV; (ii) A grave and criminal assault on 3 April 2022 which offence occurred at the time that the Defendant was a steward in a nightclub and involved him scuffling with a customer who he had asked to leave. The customer was showing no resistance and the Defendant had lunged at him and punched him once to the left side of the face rendering him unconscious. 7. The matter is covered by Article 82F of the Police Procedures and Criminal Evidence (Jersey) Law 2003 ("the Law") which reads as follows: "82F Matter in issue between the defendant and the

prosecution

- (1) Subject to paragraph (2), evidence of a defendant's bad character is admissible if it is relevant to an important matter in issue between the defendant and the prosecution which includes - (a) the question whether the defendant has a propensity to commit offences of the kind with which he or she is charged, except where the defendant having such a propensity makes it no more likely that he or she is guilty of the offence; or (b) the question whether the defendant has a propensity to be untruthful, except where it is not suggested that the defendant's case is untruthful in any respect.
- (2) Only prosecution evidence is admissible under this Article.
- (3) Where paragraph (1)(a) applies, a defendant's propensity to commit offences of the kind with which he or she is charged may (without prejudice to any other way of doing so) be established by evidence that the defendant has been convicted of - (a) an offence of the same description as the one with which he or she is charged; or (b) an offence of a similar nature or type as the one with which he or she is charged.
- (4) Paragraph (3) does not apply in the case of a particular defendant if the court is satisfied that, by reason of the length of time since the conviction or for any other reason, it would be unjust for it to apply in his or her case.
- (5) For the purposes of paragraph (3)(a), 2 offences are of the same description as each other if the statement of the offence in a summons under Article 14 or 19 of the Criminal Procedure Law, or indictment under Article 43 of that Law, would, in each case, be in the same terms.
- (6) For the purposes of paragraph (3)(b), the States may, by Regulations, make provision as to what constitutes 2 offences as being of a similar nature or type as each other.
- (7) Where - (a) a defendant has been convicted of an offence under the law of any country other than Jersey ("the previous offence"); and (b) the previous offence would constitute an offence under the law of Jersey ("the corresponding offence") if it were committed in Jersey at the time of the trial for the offence with which the defendant is now charged ("the current offence"), paragraph (8) applies for the purpose of determining if the previous offence and the current offence are of the same description or of a similar nature or type.
- (8) For the purpose of making the determination referred to in paragraph (7) - (a) the previous offence is of the same description as the current offence if the corresponding offence is of that same description as defined under paragraph (5); or (b) the previous offence is of a similar nature or type as the current offence if the current offence and the corresponding offence are of a similar nature or type as provided under the Regulations referred to in paragraph (6)." 8. The Crown proceeds on the basis of Article 82F(i) in that the convictions set out above are relevant to an important matter in issue - namely whether the Defendant acted in self-defence or not, and Article 82F(i)(a) in that the convictions for offences of violence demonstrate a continuing propensity to commit offences of violence. It is argued that this is particularly so in connection with the 2023 conviction occurring as it did within a

week of the index offence. 9. Archbold (2024 edition) at chapter 13 provides that the above gateway renders the evidence of a defendant's bad character admissible where: "It is relevant to an important matter in issue between the defendant and the prosecution and this means that, before bad character evidence can be admitted through this gateway it is necessary to identify what that matter in issue is, and also identify what light the bad character evidence would shed on it. If the bad character evidence shed no light on the issue in dispute then the gateway....will not let it in." 10. In connection with propensity, the Royal Court in AG v M & P

[2019] JRC 247, quoting the English Court of Appeal judgment in R v Hanson

[2005] 2 Cr App R21 states: "(i) Quoting from paragraph 4 of the

judgment:

4. The starting point should be for judges and practitioners to bear in mind that Parliament's purpose in the legislation, ... was to assist in the evidence based conviction of the guilty, without putting those who are not guilty at risk of conviction by prejudice. It is accordingly to be hoped that prosecution applications to adduce such evidence will not be made routinely, simply because a defendant has previous convictions, but will be based on the particular circumstances of each case." (ii) There are three questions to be considered when considering propensity:- "1. Does the history of conviction(s) establish a propensity to commit offences of the kind charged?
2. Does that propensity make it more likely that the defendant committed the offence charged?
3. Is it unjust to rely on the conviction(s) of the same description or [similar nature or type]; and, in any event, will the proceedings be unfair if they are admitted?". (paragraph 7) (iii) As mentioned above, in referring to offences of the same description or of a similar nature or type Article 82F(3) is not exhaustive of the types of conviction which might be relied upon to show evidence of propensity to commit offences of the kind charged. Nor, however, is it necessarily sufficient in order to show such propensity that a conviction should be of the same description or similar nature or type as that charged. (paragraph 8) (iv) There is no minimum number of events necessary to establish propensity. A single previous conviction for an offence of the same description or category will often not show propensity, but it may do so where it shows a tendency to unusual behaviour or where its circumstances demonstrate probative force in relation to the offence charged. Circumstances demonstrating probative force are not confined to those sharing striking similarity. If the modus operandi has significant features shared by the offence charged it may show propensity. (paragraph 9)
- (v) When considering what is just under Article 82F(4) and the fairness of the proceedings under Article 82E(2), the judge may inter alia take into consideration the degree of similarity between the previous conviction and the offences charged. This does not however mean that what used to be referred to as striking similarity must be shown before convictions become

admissible. (paragraph 10) (vi) The judge may also take into consideration the respective gravity of the past and present offences. (paragraph 10) (vii) The judge must always consider the strength of the prosecution case: "If there is no or very little other evidence against a defendant, it is unlikely to be just to admit his previous convictions, whatever they are". (paragraph 10) (viii) If there is a substantial gap between the dates of the commission of and conviction for the earlier offences, the date of commission is generally more significant. (paragraph 11) (ix) Old convictions with no special feature shared with the offence charged, are likely seriously to affect the fairness of proceedings adversely, unless despite their age, it can properly be said that they show a continuing propensity. (paragraph 11)

- (x) It will often be necessary, before determining admissibility and even when considering offences of the same description or similar nature or type, to examine each individual conviction rather than merely look to the name of the offence. (paragraph 12) (xi) The sentence passed will not normally be probative or admissible. (paragraph 12) (xii) Where past events are disputed the judge must take care not to permit the trial unreasonably to be diverted into an investigation of matters not charged on the indictment. (paragraph 12))." 11. In my judgment, the previous convictions fall to be put before the jury under both of the gateways relied upon to that end by the Crown. It seems to me that the jury should be aware of any previous violence on the streets in which the Defendant has been involved in considering the likelihood or otherwise of self-defence, but furthermore on the propensity of the Defendant to act with violence in these circumstances. 12. Both of these items relate to the convictions and the defence's case does not amount to a claim that the altercation between him and the Complainant did not take place, but rather whether or not he could be said to have acted in self-defence. Naturally, the jury will be given the appropriate directions in connection with the use that may be made of such evidence but, in my view, it is appropriate that such evidence is before them. 13. Given that these are both convictions I would assume that it is possible to reduce this evidence to admissions that are put before the jury and that the trial need not be extended by the reason of its admission. 14. I should also note on this aspect that counsel for the defence, although drawing to the Court's attention the overriding discretion to refuse to admit such evidence, appeared to advance the argument that in fact this evidence should be before the jury provided that the Complainant's bad character evidence was also admitted. Bad character of the Complainant 15. The Defendant applies to admit bad character evidence of the Complainant. 16. This is covered by Article 82J of the Law which is in the following terms: "82J Non-defendant's bad character
- (1) In criminal proceedings evidence of the bad character of a person other than the defendant is admissible if and only if -
- (a) it is important explanatory evidence;
- (b) it has substantial probative value in relation to a matter which - (i) is a matter in issue in the proceedings, and (ii) is of substantial importance in the context of the case as a whole; or

- (c) all parties to the proceedings agree to the evidence being admissible.
- (2) For the purposes of paragraph (1)(a) evidence is important explanatory evidence if -
 - (a) without it, the court or jury would find it impossible or difficult, properly to understand other evidence in the case; and
 - (b) its value for understanding the case as a whole is substantial.
- (3) In assessing the probative value of evidence for the purposes of paragraph (1)(b) the court must have regard to the following factors (and to any others it considers relevant) -
 - (a) the nature and number of the events, or other things, to which the evidence relates;
 - (b) when those events or things are alleged to have happened or existed;
 - (c) where - (i) the evidence is evidence of a person's misconduct, and (ii) it is suggested that the evidence has probative value by reason of similarity between that misconduct and other alleged misconduct, the nature and extent of the similarities and the dissimilarities between each of the alleged instances of misconduct; and
 - (d) where - (i) the evidence is evidence of a person's misconduct, (ii) it is suggested that that person is also responsible for the misconduct charged, and (iii) the identity of the person responsible for the misconduct charged is disputed, the extent to which the evidence shows or tends to show that the same person was responsible each time.
- (4) Except where paragraph (1)(c) applies, evidence of the bad character of a person other than the defendant must not be given without leave of the court." 17. The application is made under Article 82J(i)(a) because, it is argued, the information to be provided is important explanatory evidence and also under Article 82J(i)(b) because it has substantial probative value in relation to a matter which (a) is matter in issue in the proceedings and (b) is of substantial importance in the context of the case as a whole. 18. The bad character evidence that the Defendant seeks to adduce is as follows: (i) The Complainant's conviction for "assault to injury " before the Glasgow Sheriff Court on 9 March 2021 for which he received an admonishment. There is not a great deal of information known save that it was an assault on police officers; (ii) The Complainant's written caution at the parish hall for refusing to quit licensed premises, conduct likely to cause a breach of the peace and resisting arrest. This took place in February 2018. He was apparently seen by staff at the Havana nightclub to be drunk and " bouncing off the walls " and when asked to leave he refused to do so. After being ejected, he tried to push through the barrier and appeared to be aggressive - he was taken to the floor, police officers attended and he was arrested. Leg restraints were applied; (iii) A police log entry noting the Complainant was arrested for breach of the peace by fighting. CCTV footage was reviewed and it appeared that another male had headbutted a female, the Complainant went over to assist and ended up involved in a fight. It is alleged that he spat at someone. The police log notes that words of advice were given to him and no further action was taken; (iv) Previous incidents of the Complainant impersonating members of uniformed

emergency services and intervening in situations. A number of incidents are recorded by the police during March of this year. 19. The defence assert that the Complainant gets involved in altercations that he comes across and acts as a self-appointed vigilante. 20. In *AG v Reis*

[2022] JRC 220 , the Court has observed that the statutory bar for admission of non-defendant bad character is a " relatively high one ". 21. The effect of Article 82J of the Law was considered in the case of *AG v PMB*

[2021] JRC 335 in which the Court, MacRae, Deputy Bailiff presiding, said this: "30. After much debate about the extent to which bad character evidence in respect of a non- defendant witness is admissible, particularly where the issue is the credibility of the witness and where the convictions are not merely convictions for dishonesty, the current approach which prevails in England and Wales was settled by the English Court of Appeal in *R -v- Brewster and Cromwell*

[2010] 2 Cr App R 20 . In that case the defendants were convicted of kidnapping, the complainant alleging that she had been kidnaped by the defendants. Her creditworthiness was a matter in issue in the proceedings and the defence unsuccessfully applied to cross-examine her upon her previous convictions for burglary, theft, and manslaughter, all of which she had admitted. The alleged kidnapping took place in early 2009 and the offences committed by the complainant occurred over the previous nine years. Of particular concern to the defence was the conviction for manslaughter, owing to the circumstances in which that offence was committed. That offence took place approximately five years prior to the alleged kidnapping. At paragraph 21 of the judgment of the Court of Appeal Pitchford, LJ, giving the judgment of the court said: "22. It seems to us that the trial judge's task will be to evaluate the evidence of bad character which it is proposed to admit for the purpose of deciding whether it is reasonably capable of assisting a fair-minded jury to reach a view whether the witness's evidence is, or is not, worthy of belief. Only then can it properly be said that the evidence is of substantial probative value on the issue of creditworthiness. In reaching this view, with respect to the court in *S (Andrew)* , we agree with the observations of Hughes L. J. in *Stephenson* . It does not seem to us that the words "substantial probative value", in their s.100(1)(b) , context require the applicant to establish that the bad character relied on amounts to proof of a lack of credibility of the witness when credibility is an issue of substantial importance, or that the convictions demonstrate a tendency towards untruthfulness. The question is whether the evidence of previous convictions, or bad behaviour, is sufficiently persuasive to be worthy of consideration by a fair-minded tribunal upon the issue of the witness's creditworthiness. When the evidence is reasonably capable of giving assistance to the jury in the way we have described, it should not be assumed that the jury is not capable of forming an intelligent judgment whether it in fact bears on the present credibility of the witness and, therefore, upon the decision whether the witness is telling the truth. Jurors can, with suitable assistance from the judge, safely be left to make a proper evaluation of such evidence just as they are when considering

issues of credibility and propensity arising from a defendant's bad character."

31. The court went on to set out what the approach of the trial judge should be under the equivalent to Article 82J(1)(b): "23. The first question for the trial judge under s. 100(1)(b) is whether creditworthiness is a matter in issue which is of substantial importance in the context of the case as a whole. This is a significant hurdle. Just because a witness has convictions does not mean that the opposing party is entitled to attack the witness' credibility. If it is shown that creditworthiness is an issue of substantial importance, the second question is whether the bad character relied upon is of substantial probative value in relation to that issue. Whether convictions have persuasive value on the issue of creditworthiness will, it seems to us, depend principally on the nature, number and age, of the convictions. However, we do not consider that the conviction must, in order to qualify for admission in evidence, demonstrate any tendency towards dishonesty or untruthfulness. The question is whether a fair-minded tribunal would regard them as affecting the worth of the witness' evidence." 22. Archbold (2024 edition) gives further guidance on the admission of non-defendant bad character in the context of propensity. It provides at page 9: "...situations will occasionally arise in which it will be necessary to invoke s. 100 to put before the court a piece of evidence which more or less directly implicates a third party in the commission of the offence. This would be so, for instance, if D sought to reinforce their claim of self-defence by adducing evidence of Y's criminal record for unprovoked assaults; or if D's defence was that the person who killed Y was really Z, and in support of this D wishes to put before the court Z's previous homicide convictions, An example is H
- [2009] EWCA Crim 2899 , 174 J. P. 203. At H's trial for robbing a shopkeeper, at which his defence was that the author of the crime was X, he was entitled, under s. 100(1)(b) and 100(3), to adduce evidence of X's two previous convictions for robbery, as well as of X's previous theft from the shop in question. The defence will need to convince the court that the third party bad character which they wish to argue suggests another person committed the crime goes to a "viable issue' in the case." 23. The Crown argues that in the instant case the previous bad character cannot amount to important explanatory evidence. There is no doubt that the Complainant sought to intervene in the altercation between the Defendant and another male. There is CCTV evidence and it does not seem to me that the question of whether or not the Defendant was acting in self-defence was in any sense dependent upon the Complainant's motivation for intervention. The fact that the altercation and the merits of the Defendant's defence can be well understood without reference to that bad character. 24. On the question of whether the evidence may have substantial probative value, the issues to which the evidence is likely to be directed as to whether it was the Defendant or the Complainant that was the aggressor and therefore whether the Defendant was or could be acting in self-defence. 25. The Crown also submits that the assault conviction and parish hall cautions do not demonstrate any propensity on the Complainant to be violent. There is only one conviction, that in Scotland, and it must have been relatively low level, so the Crown argue, because it received nothing more than an admonishment. 26. The Crown argues that the question of vigilantism does not relate to

the matter in issue. There is no dispute that the Defendant was having a fight with another male which he characterises as a play fight, and that the Complainant intervened. There was no suggestion that the Complainant purported to be a first responder, paramedic or police officer, and the mere fact of his intervention does not of itself make the information that he has intervened in that way on previous occasions relevant. 27. Lastly, the Crown argue that the information cannot go to creditworthiness. The Crown accepts the creditworthiness of the Complainant is a matter in issue which is of substantial importance in the context of the case as a whole. The Crown submits, however, that the alleged bad character is not sufficiently persuasive to be worthy of consideration as it does not get over the significant hurdle required for its admission. 28. I do not think it appropriate to admit the first responder allegations from the police information. As has been referred to above, it is not disputed that the Complainant sought to intervene and his motivation for doing so does not seem to me to be potentially relevant given that there was no allegation that he asserted that he had any right as a first responder, either working for the ambulance service or the police, to intervene in that way. He was not known to the Defendant and therefore the Defendant's actions in believing he was under threat was not informed by any knowledge that the Complainant may or may not act out of a sense of vigilantism. 29. It does seem to me, however, that the parish hall matter is something that is appropriate to go before the jury. 30. I am prepared to allow this to be included in the admissions in the form set out in the proposed wording provided by defence counsel. 31. As to the Scottish conviction, this seems to me to be a minor matter but of a similar type to the Parish Hall matter. I am content that the fact of this conviction is placed before the jury in the form of an admission. I will hear further argument at the trial if the form of admission cannot be agreed. Authorities Police Procedures and Criminal Evidence (Jersey) Law 2003. Archbold Criminal Pleading, Evidence and Practice. AG v M & P

[2019] JRC 247. R v Hanson

[2005] 2 Cr App R21 . AG v Reis

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