

JERSEY / JUDGMENT

AG v Withe [2023] JRC 111 (21 February 2023)

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JUDGMENT

THE BAILIFF: 1. This is an application by the Attorney General, firstly to adduce certain evidence by way of rebuttal evidence and secondly to adduce evidence of the Defendant's bad character.

Background

2. The Defendant is charged with one count which alleges on 17 February 2022, he committed a grave and criminal assault on the Complainant. 3. At the time of the alleged assault, the Defendant and the Complainant were in a relationship together. She is now aged 19 and was aged 18 on the day of the alleged assault. 4. On the Crown's case: (i) the Complainant and the Defendant had begun the relationship in July 2021. The Complainant has given an account of violent, coercive and controlling behaviour on the part of the Defendant starting approximately a month into that relationship. (ii) the Defendant would physically prevent the Complainant from leaving the house to go to her workplace and was jealous of the work that she did with male colleagues. Sometimes she would feel that she had to call in sick and make excuses for her absence. (iii) In January 2022, the Defendant moved in to live with his mother and the Complainant frequently spent time at that address. (iv) On 17 February, the Complainant and the Defendant were at that address. The Complainant was due to start her shift at 1400 hrs. There was an altercation between her and the Defendant relating to his use of her personal cleaning products. During the course of that confrontation, the Defendant asked why she was getting upset and blocked her attempts to leave to go to work. He locked all of the doors so that the Complainant was trapped. (v) He grabbed her hair and pulled her backwards causing her to fall to the ground. She ran upstairs, he chased her and dragged her backwards down the stairs. This happened on a number of occasions and on one occasion, it is alleged, he threw the Complainant back down the stairs. (vi) The Complainant escaped into a bedroom and sent her mother and sister a message via Snapchat on her phone saying she was scared and that the Defendant would not let her leave for work. The Complainant's mother opened the message which comprised a video showing a door and she could hear her daughter on the video saying " come and get me, Mum... ". She made her way to the property. The Complainant turned on her camera when she heard the Defendant coming and when he entered the room, she noticed he had a knife tucked into his waistband. The

altercation continued and there are allegations that the Defendant jumped on top of her, putting his weight on the Complainant, he began to strangle her and use his elbows to put pressure forcefully on her chest. He used one hand to cover her mouth and nose and the other was around her neck. She tried to get him to release her but he carried on trying to suffocate her. (vii) She crawled out of his grip. The altercation continued. When the Defendant's mother walked in, the Complainant took the opportunity to run through the open door barefoot as quickly as she could. She encountered her own mother who went into the house, retrieved the Complainant's phone. She said to her mother on the way back that the Defendant had thrown her down the stairs and she was described by her mother as being "in hysterics". 5. The above is a very brief synopsis of the Crown's case and there are other aspects to it that I have not mentioned. The above is sufficient, however, to get a flavour and to put in context the applications before me by the Crown. 6. The Defence has put in a case statement which denies the material allegations set out above. Ultimately, these will be matters for the jury. Rebuttal evidence 7. The first application before me is for the Crown to admit the evidence of Witness 1 and Witness 2 as rebuttal evidence. 8. Witness 1 is the Complainant's Manager and on one occasion when the Complainant reported in sick, the Complainant opened up to her and told her about the nature of her relationship with the Defendant. She said that he had been beating her up and that she had fallen down the stairs. She explained that some of her sickness was not what she had reported, that the Defendant had choked her so that she could not breathe. 9. The evidence of Witness 2, the Complainant's aunt, is of a similar type. In her statement she describes how the Complainant had told her amongst other things that the Defendant had strangled her and was abusive towards her. She also told her that the Defendant had thrown her down the stairs. 10. The Crown puts the application on the basis that it is clear from the Defence's case statement that the Defence is alleging that the Complainant is telling lies and is, accordingly, making the allegations up. The evidence of Witness 1 and Witness 2 would be hearsay, of course, but should be admitted to rebut any evidence as to that fabrication. 11. Article 67A(2) of the Police Procedure and Criminal Evidence (Jersey) 2003 ("the 2003 Law") provides: "If a previous statement by the witness is admitted as evidence to rebut a suggestion that his or her oral evidence has been fabricated, that statement is admissible as evidence of any matter stated of which oral evidence by the witness would be admissible." 12. The Crown put before me the case of *R v Athwal*

[2009] 2 Cr. App. R.14 in which the Court of Appeal considered the effect of English statutory provisions which are in effect identical to the equivalent provisions of the 2003 Law. This case concerned a murder and considered the interplay between previous consistent statements and recent fabrication. The judge below had approached the matter from the Common Law perspective which approach, whilst correct as to its result, was disapproved by the Court of Appeal on the basis that the issues should have been approached under the English statutory provisions. 13. After carrying out a careful analysis of the principle of recent fabrication, whether or not statements admitted to rebut such an allegation were hearsay or otherwise, the Court of Appeal, at paragraph 53 of the judgment said this:

"What, then, is the effect of these provisions so far as 'recent fabrication' is concerned? Once a previous statement is admitted to rebut a suggestion of fabrication, s.120(2) is clear. The statement 'is admissible as evidence of any matter stated'. That is the same language as is used in s.114(1). The basic provision for the admissibility of hearsay evidence is that 'a statement not made in oral evidence in the proceedings is admissible as evidence of any matter stated' subject to certain conditions. In our judgment, all this leads inexorably to the conclusion that a previous statement which is admitted to rebut a suggestion of fabrication is admitted as admissible hearsay under the regime of the 2003 Act. It is admissible as evidence of any matter stated because s.114(1)(a) provides that it is so admissible 'if...any provision of this chapter...makes it admissible' and s.120(2) makes it admissible for that purpose. That does not mean that it must always be admitted. Section 114(3) continues to permit its exclusion on other grounds - for example, pursuant to Section 78 of the Police and Criminal Evidence Act 1984, insofar as the evidence is sought to be relied upon by the Prosecution" 14. The Defence cites a further extract from *R v Athwal* from paragraph 58 as follows: "58. We have this observation. It is noticeable that s.120(2) refers to fabrication but without the temporal qualification (recent). Again, this replicates the recommendation of the Law Commission. The omission of the qualification may be welcome simplification. However, it is clear that the Commission did not recommend a wholesale departure from the previous approach. Indeed, it concluded that 'the circumstances in which this minor exception can be used are best left alone'... On the other hand, we do not consider that the Common Law label of recent fabrication is to be confined within a temporal straightjacket. This case, and others before it, demonstrate that 'recent' is an elastic description, the purpose of which is to assist in the identification of circumstances in which the traditional rule against self-corroboration, sometimes referred to as the rule against narrative, should not extend to the exclusion of a previous consistent statement where there is a rational and potentially cogent basis for its use as a tool for deciding where the truth lies. The mere fact that the witness has said substantially the same thing on a previous occasion will not generally be sufficient basis to adduce the previous statement when the truthfulness of his evidence is put in issue. There must be something more - for example, the absence on the earlier occasion of a factor, say personal dislike, which is being advanced as a possible explanation for the falsity of his evidence in court. However, when the circumstances have changed in such a way, it may not matter that they changed last week, last month or last year, provided that there is a qualitative difference in circumstances, but the substantial similarity, between the two accounts. There is no margin in the length of time. The touchstone is whether the evidence may fairly assist the jury in ascertaining where the truth lies. It is for the trial judge to preserve the balance of fairness and to ensure that unjustified excursions into self-corroboration are not permitted, whether the witness was called by the Prosecution or the Defence." 15. In *Archbold*

- [2022] at paragraph 11-69, the learned authors state: "Statements admitted under s.120(2) of the Criminal Justice Act 2003 (see § 11-67) are admissible not only to rebut a suggestion of fabrication but also as proof of the matters stated, and where a statement is introduced to rebut an allegation of recent fabrication (under s.120(2) [Art 67A(2) PPCE]) there is no need to meet the requirements of s.120(4) [Art 67A(4) PPCE] (which provides an alternative more stringent route to introducing previous consistent statements): KH
- [2020] EWCA Crim 1363 . Nor is there any requirement for the complainant to have made reference themselves to the fact that they made a previous statement: Cousins (Junior)
- [2021] EWCA Crim 1664 ;
- [2022] 4 WLR 18 . However, "the judgment as to whether the evidence should be admitted is subject to the considerations identified in s.114(2) [Art 64(2) PPCE]" as well as s.78 of PACE 1984 (§ 15B-87) [Art 76 PPCE] and "is to be exercised with care": R v BQC
- [2021] EWCA Crim 1944 , at [50], re-affirming Athwal (Bachan) and Athwal (Sukhdave) (§ 8-255) and MH (§§11-11 and 11-73)." 16. Article 64(2) of the 2003 Law states: "(2) In deciding whether a statement not made in oral evidence should be admitted under paragraph (1) (d), the court must have regard to the following factors (and to any others it considers relevant) - (a) how much probative value the statement has (assuming it to be true) in relation to a matter in issue in the proceedings, or how valuable it is for the understanding of other evidence in the case; (b) what other evidence has been, or can be, given on the matter or evidence mentioned in sub-paragraph (a); (c) how important the matter or evidence mentioned in sub-paragraph (a) is in the context of the case as a whole; (d) the circumstances in which the statement was made; (e) how reliable the maker of the statement appears to be; (f) how reliable the evidence of the making of the statement appears to be; (g) whether oral evidence of the matter stated can be given and, if not, why it cannot; (h) the amount of difficulty involved in challenging the statement; and (i) the extent to which that difficulty would be likely to prejudice the party facing it." 17. The statutory provisions above and, indeed, the case of R v Athwal have been considered in a full judgment by the Deputy Bailiff in the case of AG v Freitas
- [2022] JRC 042. In that case, the court, at paragraph 17, said this: "17. It was suggested on behalf of the defence that the Court should consider the customary law principles which applied to the admission of statements to rebut an allegation of fabrication. I disagree. The provisions of the law in respect of hearsay are meant to represent a code dealing with hearsay and the customary law is no longer relevant save as provided by Article 64A. This is on the assumption that the material in question is tendered as hearsay evidence which this evidence was, i.e., a statement not made in oral evidence which is to be admissible as evidence of the matter stated, having regard to the definition of "matters stated" contained in Article 63. Previous statements admitted for this purpose no longer only go to consistency of the maker but are evidence of truth of their contents." 18. The court, at paragraph 18, went on to say: "18. However, defence counsel drew to my attention an

extract from Section 9 on Phipson on Evidence (20th Edition). Phipson is critical of the decision of the Court of Appeal in Athwal and says "In R -v- Athwal the Court of Appeal seem to think that the admissibility of the statement in issue was controlled by S114(1)(a) to be read in conjunction with S120(2). The reasoning is dubious because neither S114(1)(a) nor S120(2) confers a substantive power to admit the evidence." Phipson says "The common law rule is not eliminated by S120(2) or any other hearsay section in the 2003 Act." Phipson goes on to say "There may be circumstances where a statement is admissible under the common law rule (in which case S120(2) applies) and also under S120(4) and S120(7)". I will consider the latter below as those provisions are the mirror of Article 64A(4) and Article 64A(7)." 19. The court, at paragraph 20, made reference to Archbold (2021 edition) in the following terms: "20. Archbold (2021 Edition) at paragraph 11-36 notes that the effect of section 120(2) (the equivalent to Article 67A(2)) is to reverse "the common law rule that a statement admitted for this purpose was not evidence as the truth of its contents". This is plainly also the case under the Jersey equivalent provision. It is also stated at paragraph 8-254 of Archbold that the effect of this provision is to abolish the requirement that the fabrication does not need to be a "recent" one. Accordingly, this type of evidence may be admissible i.e., the body worn camera footage of a complaint. Archbold refers to Athwal noting that the case decided that Section 120(2) did not require a suggestion of "recent fabrication" but went on to consider paragraph 58 of the judgment in Athwal in which the Court said that "The mere fact that the witness has said substantially the same thing on a previous occasion will not generally be sufficient to adduce the previous statement when the truthfulness of his evidence is put in issue". In the same paragraph the Court also said that there needed to be a substantial similarity between the two accounts (i.e., the account given in evidence - which we can predict in this case owing to the terms of the video standing as evidence in chief, and the body worn camera footage) and that "The touchstone is whether the evidence may fairly assist the jury in ascertaining where the truth lies. It is for the trial judge to preserve the balance of fairness and to ensure that unjustified excursions into self-corroboration are not permitted, whether the witness was called by the prosecution or the defence". However, Archbold goes on to say that the Court of Appeal was in error in approaching Section 120(2) on the basis that it did more than provide that when a statement is admitted to rebut the suggestion of fabrication, the statement is admissible as the truth of its contents - it did not purport to provide when a statement may be admitted for this purpose." 20. The Deputy Bailiff then went on to say, at paragraph 23: "23. In my view, the gateway to admissibility is not Article 64(1)(a) as suggested by the Crown as Article 67A(2) does not make this particular category of evidence admissible but merely regulates the use to which such evidence, once admitted, may be put. The gateway in my view is Article 64(1)(d), i.e., the Court's power to declare evidence admissible if the Court is satisfied that it is in the interests of justice for it to be admissible. In those circumstances, it is not appropriate to consider the common law conditions of admissibility, such as those set out in R -v- Oyesiku

[1972] 52 Cr. App R240 (see Archbold at 8-254) but the statutory requirements which are a pre-condition to admissibility contained in Article 64(2) of the Law which were analysed in the skeleton argument filed by Advocate Dix which was largely adopted by Advocate Harrison. Accordingly, in summary it is the provisions of the statute, not customary law, which govern the admissibility of this type of evidence and the gateway to admissibility is Article 64(1)(d) having regard to the regulation as to the use of such material contained in Article 67A(2) and the considerations set out in Article 64(2). Indeed, the evidence would be admissible pursuant to the gateway contained in Article 64(1)(d) alone without there being need for reference to Article 67A(2)." 21. Thereafter, the court proceeded to carry out a detailed analysis of the Article 64(2) factors as they appeared to the Deputy Bailiff to apply in that case. 22. I agree with the approach set out in the case of Freitas . 23. The Crown submits that in the light of the fact that the Defence is saying that the entire allegation has been fabricated and that the Complainant is herself the aggressor, the evidence of what the Complainant told others is important evidence which may be valuable to a jury's assessment of the Defendant's claim that she has fabricated her complaint. 24. Furthermore, the Crown submits that the Complainant can give evidence as to the alleged offence and whether or not she fabricated the complaint. She can also give evidence as to her fearful state of mind. The allegation of fabrication is a central plank of the Defence case and therefore any evidence in rebuttal is of central importance. The evidence of what the Complainant allegedly said to her Manager, Witness 1, or to her aunt, Witness 2, is recorded in Article 9 statements. There is no suggestion that they are unreliable in the sense that they were made in the form recorded by the deponents to the statement and, of course, the statements can be challenged in cross-examination. 25. The Defence argues that the Crown is simply seeking to admit hearsay evidence and it should not be permitted to do so. The Defence's case is that it is presenting a general denial and an assertion that the complaint is grossly exaggerated and untrue. The Defence maintains the Complainant has falsely reported the situation from the day of the alleged incident and therefore is not asserting that the complaint is a recent fabrication or a late invention. It is not permissible for the Crown to advance repeated complaints to rebut a denial. A statement is not made more credible by repetition and, indeed, the jury should not be encouraged to think that it is. 26. The Defence goes on to argue that the Complainant has given a previous inconsistent statement in terms of what she told her General Practitioner. With regard to the evidence of Witness 1, all she says about the detail of the Complainant's complaint is that " she said he had hitting her [sic] and she fell down the stairs ". This would not be consistent with the detail of the Complainant's allegations. 27. The Defence argues that there is a risk of contamination as Witness 1 is also the colleague of Witness 2, and it is clear that Witness 1 had told the Complainant that she should go and speak with Witness 2. Witness 2's statement recounts that at some point, the Complainant had complained to her about her boyfriend but also that she had received information from the Complainant's mother and it appears that there may have been conversations between Witness 2 and the Complainant's mother subsequently. The Complainant's statement was not entirely consistent, however, in that Witness 2 states that " she (the Complainant) told me that he

had been strangling her...all whilst his own mother was inside their home address ". 28. Looking at the factors set out at Article 64(2) of the 2003 Law, it seems to me: (i) The evidence is moderately probative in the sense that it demonstrates the consistency of the evidence given by the Complainant both to the police when the complaint was first made and to her employer and later to her aunt. It cannot, of course, be highly probative because the evidence comes only from the Complainant but, of course, the jury will form a view of the Complainant's reliability as a witness and they will receive direction from me to that effect; (ii) The other evidence will, of course, come directly from the Complainant herself; (iii) The evidence is important in the context of the case as a whole because the essence of the Defence's case is that the Complainant has either made up or exaggerated the allegations. Whilst it is the case that mere repetition of the allegation should not as a general rule be admitted, the suggestion that it has been entirely fabricated can, in my view, be met with a proportionate reference to evidence that suggests that the Complainant has been consistent; (iv) The evidence with regard to Witness 1 is evidence given by the Complainant in the context of her employment and explaining why she had taken leave of absence. The information provided to Witness 2 by the Complainant is information that she has given to a trusted family member. Both of those statements are made, in my view, in circumstances which are neither surprising nor suspicious but they are, at the end of the day, simply statements made by the Complainant; (v) The reliability of the statement will be entirely a matter for the jury to determine by their assessment of the Complainant; (vi) The evidence is given in statements by Witness 1 and Witness 2 and there is no reason, *prima facie*, to suggest that those statements are unreliable. Naturally, however, should they be admitted it will be open to the Defence to cross-examine on them; (vii) Oral evidence can and will be given by the Complainant in this case. Similarly, oral evidence as to the making of the statement will be given by Witness 1; (viii) There does not appear to me to be an appreciable difficulty in challenging the statements. The Defence would be able to challenge the statements in precisely the same way as they could challenge the evidence given by the Complainant and will inevitably do so; (ix) In my view, the challenge to the evidence contained in the statements of Witness 1 and Witness 2 will not prejudice the Defendant because he will be able to cross-examine the makers of the statements in precisely the same way as the Complainant could be cross-examined. 29. The Crown quite correctly says that, of course, the court may refuse to permit the Crown to adduce evidence pursuant to Article 76 of the 2003 Law which is in the following terms: "(1) Subject to paragraph (2), in any proceedings a court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would so adversely affect the fairness of the proceedings that the court ought not to admit it.[105] (2) Nothing in this Article shall - (a) prejudice any rule of law requiring a court to exclude evidence; or (b) apply to extradition proceedings.[106] (3) Nothing in this Law shall prejudice any power of any court to exclude evidence, whether by preventing questions from being put or otherwise, at its discretion."

Ruling

30. Any statements made by the Complainant to either Witness 1 or Witness 2 are hearsay. It is of course possible that the statements could be made by the Complainant to reinforce her story. It is for that reason that the general principle that statements consistent with the Complainant's evidence made to third parties are not generally admissible as evidence as to their truth. 31. There is no allegation here of recent fabrication or late complaint. The allegation is that the entire incident was exaggerated and the Defence will say that whatever the Complainant may have said to either Witness 1 or Witness 2 are examples of that same exaggeration. 32. I fall back on the normal principle that mere repetition of an allegation cannot make it more true and that there is a risk if an allegation is repeated by way of hearsay evidence before a jury, then the weight of that repetition may be given inappropriate regard by the jury. 33. I am concerned that there is some risk of contamination of Witness 2's evidence because of conversations that she may or may not have had both with Witness 1 but most importantly with the Complainant's mother. In the circumstances, I do not think Witness 2's evidence should be admitted. 34. It would seem to me to be wrong, in any event, for a succession of consistent statements to be admitted as even with careful direction, a number of such statements may well have a disproportionate and inappropriate effect on the jury's thinking. This risk is significantly reduced by a single statement, however. 35. Balancing the factors set out in Article 64(2) as best I can, I allow the statement of Witness 1 to be adduced into evidence. 36. I have also considered Article 76 set out above and it does not seem to me that the admission of the single statement of Witness 1 as to what she had been told by the Complainant would so adversely affect the fairness of the proceedings that I ought not to admit it. 37. Accordingly, I admit the proposed evidence of Witness 1 on the basis that the Complainant will first have given evidence that she had made such a statement and that, of course, it was true. I will also direct the jury that they must keep in mind that whatever the Complainant told Witness 1 came from the Complainant alone and did not amount to independent evidence that the Defendant committed the offence with which he is charged. Bad character 38. The Crown seeks to rely on parts of the Complainant's statement that do not relate to the incident charged. 39. The Crown first asserts that the Complainant's evidence does not amount to bad character evidence as it falls within Article 82C(a) of the 2003 Law. That Article is in the following terms: "References in this Part to evidence of a person's 'bad character' are to evidence of, or of a disposition towards, misconduct on his or her part, other than evidence which - (a) has to do with the alleged facts of the offence with which the defendant is charged; or (b) is evidence of misconduct in connection with the investigation or prosecution of that offence." 40. The identical statutory wording was considered in the case of *R v McNeill*

[2007] EWCA Crim 2927 in which the English Court of Appeal considered the general application of the wording in the English Statute which is the equivalent of Article 82C(a). The court in *McNeill* said this: "13. In support of his submission that this evidence lay outside the exception to section 98(a), he contended that it was evidence of a separate offence, on a separate occasion, in a different location, made to a different person. He suggested that, if

such evidence was to be admitted at all, then a separate charge of threats to kill should have been laid in relation to that separate occasion on 30th September. He subsequently accepted that that last submission might have some difficulties given that there was no ready likelihood of there being an intent to put Miss Cooper in fear of a threat to her life by reference to what was said about the appellant's intentions towards her neighbour, Mr Clements. Mr Mackinnon resiled from his suggestion that a separate offence of threat to kill could have been laid in relation to the event of 30th September. Nevertheless, he said it was a separate occasion and therefore could not come within the words of section 98(a), however broad the *prima facie* content of those words might appear to be. He directed our attention to the text of paragraph 13-6 of Archbold, where those words are discussed as relating to conduct which is a precondition of some other offence, like a disqualification from driving in relation to an offence of driving whilst disqualified, or as relating to a conspiracy or joint enterprise allegations, cases where other offending conduct, or bad character conduct, is a necessary and inherent part of some offence charged.

14. In our judgment, however, the words of the statute "has to deal with" are words of *prima facie* broad application, albeit constituting a phrase that has to be construed in the overall context of the bad character provisions of the 2003 Act. Thus the breadth of the words are clearly limited by the context for instance of section 101(1)(c)'s reference to important explanatory evidence, and gateway (d)'s more general reference to important matter in issue, which taken together with section 103 relates to propensity and previous convictions. In our judgment, it would be a sufficient working model of these words if one said that they either clearly encompass evidence relating to the alleged facts of an offence which would have been admissible under the common law outside the context of bad character or propensity, even before the Act, or alternatively as embracing anything directly relevant to the offence charged, provided at any rate they were reasonably contemporaneous with and closely associated with its alleged facts (see for instance the reference to *R v Machado* noted towards the end of Archbold 13 - 6)." 41. The section of the Complainant's evidence which the Crown seek to adduce under this heading is fairly extensive and I summarise it in brief as comprising allegations that: (i) The Defendant was of a jealous nature and his apparent jealousy increased after about a month of the relationship with the Complainant. Whilst at Rojos nightclub, the Complainant was speaking to an old friend when the Defendant came over and "picked this male up by the scruff of his top and literally chucked him backwards"; (ii) The Defendant became verbally abusive towards the Complainant. He would tower over her and intimidate her and shout and scream in her face and use words such as "slut and slag"; (iii) The Defendant wasn't happy with the job that the Complainant took at Place A and would try to stop her going in to work. She began to feel scared about his jealousy but hated confrontation. She would call in sick and not go to work; (iv) She began to feel increasingly fearful of the Defendant and as his jealousy increased she started to remove male friends from her phone list and to distance herself from them. The Defendant started to go through her phone checking messages and call logs; (v) The first time the Defendant became physical was when the Complainant was trying to leave his father's address to go to work but

he stood in front of the door and stopped her from leaving, grabbed hold of her hands and threw her to the ground and sat on top of her, pinning her arms to the ground; (vi) After the first assault, his behaviour worsened and he would physically stop her from leaving the property whenever she wanted to leave and grab hold of her and pinned her to the floor, would sit on her stomach and she would beg him to get off. He showed no emotions or remorse and he would laugh the incident off after it; (vii) The physical abuse continued at his mother's address whilst she was at work and if the Complainant sought to leave, even to see her mother, the Defendant would refuse and stop her leaving; (viii) In early February 2022, whilst at the Defendant's mother's address there was a verbal argument. The Complainant shouted at the Defendant during the course of an argument and he knocked her hand out of the way. She was fearful and attempted to leave to the room but the Defendant placed his hands on her shoulder and threw her around the room. There was an allegation of strangulation and there was a struggle. She escaped to the bathroom and the Defendant banged on the door and screamed for her to let him in; (ix) She did not leave the Defendant and did not know why. The Defendant threatened to hurt either the Complainant or himself if she left. She was scared nobody would believe her and the Defendant always seemed to act really nice around the Complainant's girlfriends. 42. It is clear that some of the evidence given by the Complainant in her statement above would amount to evidence of other offences in addition to the assault with which the Defendant is charged. Other evidence may not go so far but would arguably, so the Crown allege, amount to reprehensible conduct. 43. The Crown also submits that in order to understand the events of 17 February 2022, it is necessary to understand the context and nature of the relationship between the Complainant and the Defendant. In the event that the court does not agree that the matter falls within Article 82C(a) of the 2003 Law, then the Crown submits that it is admissible under the statutory bad character provisions. However, Article 82E of the 2003 Law is in the following terms: "1. In criminal proceedings, evidence of the defendant's bad character is admissible if, but only if - ... (c) it is important explanatory evidence; or (d) it is admissible under any of Articles 82F to 82I. ... 5. For the purposes of paragraph (1)(c), evidence is important explanatory evidence if - (a) without it, the court or jury would find it impossible or difficult properly to understand the other evidence in the case; and (b) its value for understanding the case as a whole is substantial." 44. The Crown puts before me the case of AAM v R

[2021] EWCA Crim 1720 in which the English Court of Appeal stated that evidence of coercive and controlling behaviour on the part of the Defendant charged with rape in that case was admissible saying: "Evidence of controlling and/or coercive behaviour, if accepted, can support allegations of rape, particularly on the issue of consent and reasonable belief in consent. It can be good evidence of a tendency to override the wishes and feelings of the controlled person. It is also well understood that rape can be part of a pattern of control and coercion." 45. This provision has been considered on a number of occasions by this court. In AG v Baksa

- [2022] JRC 059 , the Deputy Bailiff in considering important explanatory material said, at paragraph 13: "13. The defence did not oppose the Crown's application. Nonetheless, it was necessary for the Court to be satisfied that the evidence was admissible on the basis contended for by the Crown. Although it would certainly be possible for the jury to understand the evidence without reference to the explanatory background evidence, I accept that it would be difficult to do so as it was important for the jury to appreciate the existing dynamic between the complainant and the Defendant as illustrated by recent encounters. Those incidents were sufficiently proximate in time to the alleged assaults for it to be appropriate for the jury to hear about them and as the admissions were made in a relatively narrow compass there was no real opportunity for such evidence to distract the jury from their principal task, namely identifying whether or not they were sure that the Crown had proved its case on the three counts on the indictment." 46. At paragraph 30 of the judgment, the court went on to say: "30. At the outset of the hearing, I drew to the attention of counsel the decision made by Commissioner Clyde-Smith in the case of AG -v- E
- [2021] JRC 252 where, in the context of an alleged assault committed by the defendant on the complainant in February 2021, the Crown produced a chronology setting out 12 incidents of physical and verbal abuse, including several incidents in 2013 and an incident in 2017. The Crown sought to adduce the evidence pursuant to Article 82E(1)(c) as essential background evidence, and pursuant to Article 82F as relevant to an important matter in dispute between the Crown and the defence, namely the issue raised in defence case statement as to whether or not the complainant sustained her injuries accidentally in the course of an attack that she instigated or whether as she suggested they were caused by the defendant. At paragraph 21 of the judgment the Court noted that in that case the Crown Advocate submitted that the jury were entitled to consider the complainant had made similar allegations against the defendant over the previous eight years which had a striking similarity to what she alleged happened on the evening in question namely: (i) becoming violent having consumed alcohol; (ii) placing his hands around the complainant's neck and strangling her; (iii) pushing or throwing her around; and (iv) leaving the property immediately after the incident." 31. The defence opposed the admission of the evidence under both gateways upon which the Crown relied. 32. At paragraph 30 of his judgment, Commissioner Clyde-Smith said this: "Advocate Harrison submitted that in both R v P and R v Ladd the Court had identified a specific reason why the bad character would assist the jury, and he said there was no authority for the proposition that when a case concerns an allegation of domestic abuse, evidence of bad character in the form of past complaints is always admissible to assist the jury to properly understand the evidence in the case. I agree that there is no such authority with each case depending on its facts, but I venture to suggest that in cases of alleged domestic abuse, the background to the relationship and the history and pattern of behaviour will very often be relevant and probative; it is very difficult to consider conduct between two people in a relationship in isolation." 33. I generally agree with this observation but note that the

extent to which the previous evidence ought to be admitted will vary depending upon the circumstances of each case. The Commissioner went on to conclude that the evidence before him was important explanatory evidence under Article 82E(1)(c) and was also admissible under Article 82F, i.e., in respect of whether or not the complainant suffered injuries accidentally in the course of an attack which she instigated or at the hands of the defendant." 47. The nature of the allegation in the present case is one of domestic violence and it seems to me that it is clear that the sections in the Complainant's statement the Crown wish to adduce contain allegations of coercive and controlling behaviour. 48. The Crown also asserts that the evidence would, if the Defendant gives evidence of the allegations made by the Complainant along the lines of the Defence case statement, or she is cross-examined on the basis that she acted in the way alleged in that statement, then it may well be that the evidence would in any event be admissible under Article 82G of the 2003 Law. I do not need to make a determination on that point as the matter has not, at this stage, arisen. 49. The Defence argues that it is inappropriate to admit the evidence of character that the Crown seeks. Archbold paragraphs 13-16 are put before me in the following terms: "a. Section 98(a) of the English Act excludes from the definition of evidence of bad character any misbehaviour which "has to do with the alleged facts of the offence with which the defendant is charged". Because it therefore falls outside the definition of evidence of bad character, evidence of misbehaviour "which has to do with the alleged facts" is admissible, at common law, on the basis of its relevance alone and without recourse to ss.100 and 101. b. Section 98(a) clearly covers evidence of misbehaviour which took place at the same time as the offence for which a defendant is on trial, and was a part of it. So it would cover, for example, other criminal or otherwise improper acts which were committed in order to commit the offence: for example, the purchase of the murder weapon, the breaking of a window in order to effect a burglary, or the lesser indecencies practised on the complainant as a prelude to a more serious sexual offence. It would also cover another crime committed immediately after the offence charged in order to escape: for example, the fleeing robber's hijacking of a car. Less obviously, it has also been held to cover other misbehaviour by the defendant which took place immediately before the main offence (as in Bishop [2013] EWCA Crim 2413), or very shortly after it (as in McNeill

[2007] EWCA Crim 2927 ; 172 J. P. 50), even though this was not directly connected with it. c. However, s.98(a) does not cover other similar pieces of misconduct committed by the defendant well before the commission of the offence for which he is now on trial, however strong may be the logical inference that, because he has done this sort of thing before, therefore he is guilty of the offence now charged. In Tirnaveanu

[2007] EWCA Crim 1239 ;

[2007] 2 Cr App R 23 , a defendant who was accused of offences of facilitating unlawful immigration had been found in possession of documents suggesting that he had made a practice of doing this. The Court of Appeal ruled that this was evidence of bad character

and therefore its route to admission, if it had one, was via s.101. In so holding, the Court expressed the view that "the exclusion [in s.98(a)] must be related to evidence where there is some nexus in time between the offence with which the defendant is charged and the evidence of misconduct which the prosecution seek to adduce." So a "temporal nexus" may be required for the exception in s.98(a) to apply to similar fact evidence as adduced in *Tirnavanu*." 50. The Defence argues that information advanced by the Crown does not have a "temporal nexus" and is not "to do...with the facts of the offence...charged". Accordingly it could only be theoretically admitted under the bad character provisions but the Defence submits that the Crown should not be permitted to advance unproven conduct that amounts to other alleged assaults. They are not convictions, they have not been charged and they were not mentioned in the Prosecution's Summary for Indictment. The Defence also cites Article 82E(2) of the 2003 Law which is in the following terms: "The court must not admit evidence under Article 82F or Article 82G if, on an application by the Defendant to exclude it, it appears to the court that the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it." 51. The Defence also submits that the court should exercise its general discretionary power to exclude Prosecution evidence it would have such an adverse effect on the fairness of the proceedings that it ought not to be admitted pursuant to Article 76(1) of the 2003 Law.

Ruling

52. Much of the evidence which the Crown seeks to adduce would, I think, provide important context. 53. The behaviour alleged occurred in a 7-month period prior to the alleged assault, a relatively short period. 54. In my view, the evidence that the Complainant wishes to give as to what occurred between her and the Defendant in this relatively short relationship is important explanatory information without which the jury may struggle to understand the nature of the relationship. Naturally, whether or not the jury accepts this evidence will entirely depend upon their view of the Complainant and her reliability and, indeed, of the Defendant should he choose to give evidence. 55. It seems to me that the appropriate direction to give is one along the lines set out in the postscript to *AG v E*

[2021] JRC 252. 56. Having considered whether or not I should exclude such evidence under Article 76, I conclude that, balanced against its importance as explanatory evidence, the admission would not so adversely affect the fairness of the proceedings that the court ought not to admit it. 57. Accordingly I admit that evidence. *Authorities Police Procedure and Criminal Evidence (Jersey) 2003. R v Athwal*

[2009] 2 Cr. App. R.14. *Archbold Criminal Pleading, Evidence and Practice AG v Freitas*

[2022] JRC 042. *R v McNeill*

[2007] EWCA Crim 2927. *AAM v R*

[2021] EWCA Crim 1720 . AG v Baksa

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