

JERSEY / JUDGMENT

AG v Withe [2023] JRC 125 (20 July 2023)

[2023] JRC 125

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JUDGMENT

THE DEPUTY BAILIFF: 1. The Defendant was convicted on Thursday 15 June 2023 of common assault on an indictment alleging grave and criminal assault. 2. I need not set out the facts as they are contained in the judgment given by the Bailiff on 21 February 2023 (AG v Withe

[2023] JRC 111) at paragraphs 3 - 6 inclusive. 3. Three matters arose during the course of the trial for which I gave rulings but indicated that I would give reasons for those rulings in due course if required. The presence of the officer in the case during trial and the matters relating to the screening of the Complainant when she gave evidence 4. Before the jury was sworn, two issues were raised. 5. First, the Defence objected to the officer in the case, PC Peddlebanks, remaining in Court during the trial. The Defence objected on the footing that it was unusual for the officer in the case to remain in Court during a trial in circumstances where the officer was also a witness and that the defence had questions for the officer in due course. No suggestion was made to the effect that any of the evidence that the officer had given in her witness statements might be challenged. 6. The Crown responded to the effect that it was usual for the officer in the case to be permitted to remain in Court. In this case, the officer in the case was being tendered for the purpose of cross-examination only as the matters upon which she had made statements were either covered by way of admissions or of no relevance in the sense that the parties had evidently agreed that the evidence in question need not be adduced. 7. My experience is that generally the officer in the case is permitted to be present during the trial. This will not be the case if there is a substantive challenge to their evidence and it is likely that the Defence would be prejudiced by the officer listening to the evidence of other witnesses prior to giving evidence themselves. This was not such a case and the Defence could point to any such matters and in fact when she came to be cross-examined the evidence of the officer was of limited relevance and she was content to accept the observations made to her in the course of Defence questions about the investigation. 8. There are various general advantages to the officer in the case being in court, particularly if there is a problem which arises during the trial in relation, for example, to the attendance of a witness, an error made by the Crown in relation to disclosure and the need for further statements to be taken from additional or current witnesses. In all such circumstances, it is useful for the officer to be abreast of matters so that they have a full understanding of the problem that has arisen and the way it ought to be resolved. Accordingly, I ruled that

the officer in the case could be present in court. 9. The second matter was the Crown's application that, notwithstanding the successful application for the Complainant to be screened from the Defendant (this was an allegation of domestic violence) and the public gallery whilst giving evidence, that nonetheless the screen (which only screens approximately one third of the public gallery behind which the members of the public gallery are required to sit) be not extended to her IDVA (Independent Domestic Violence Adviser) and a friend, both of whom the Complainant would derive support from by being able to see, the Crown said, in the course of her evidence. The Defence objected to this on the footing that it was not consistent with the witness's application via the Crown to be screened and was difficult to adequately explain to the jury. The Crown was unable to tell me who the friend of the Complainant was but did inform me this was the Complainant's specific request and that she had hoped to give evidence with both the IDVA and her friend in Court. In the circumstances, I ruled that the IDVA could remain visible to the Complainant but that her friend could not, and said that the jury would be told that the public would be screened from the Complainant with the exception of a person from witness support. I directed the jury accordingly during my introductory remarks. The Crown's application to adduce the Defendant's conviction for common assault 10. On the second day of the trial, the Crown made an application to adduce the Defendant's conviction in December 2022 for an offence committed at night in St Helier of common assault on 30 July 2022 under Article 82G of the Police Procedures and Criminal Evidence Law (Jersey) 2003 ("the Law"). This application was contested by the Defence. 11. On 16 February 2023 the Bailiff gave leave to the Defence to adduce bad character evidence of the Complainant pursuant to Article 82J of the Law. I need not set out the Bailiff's judgment but in summary the Bailiff held that the Defence could ask the Complainant about the contents of a police log in respect of an incident which occurred at the Watersplash nightclub in 2022 which suggested that the Complainant had acted aggressively to another young woman. The Bailiff held that such a matter had substantive probative value in relation to a matter in issue in the proceedings namely the Complainant's propensity (if any) for violence and the Defendant's defence (as referred to in his Defence Case Statement) of self-defence. 12. The Complainant was cross-examined in relation to this matter. In fact, she denied acting aggressively, but agreed that she had pushed the young woman over and said that she had neither been arrested nor charged in relation to the matter and that the woman (and not her) had been thrown out of the nightclub in question. After this evidence had been given, the Crown made an application under Article 82G of the Law. Article 82G provides: "82G Attack on another person's character (1) Evidence of a defendant's bad character is admissible if the defendant has made an attack on another person's character. (2) Only prosecution evidence is admissible under this Article. (3) A defendant makes an attack on another person's character if - (a) he or she adduces evidence attacking the other person's character; (b) he or she (or any legal representative appointed to cross-examine a witness in the defendant's interests) asks questions in cross examination that are intended to elicit such evidence, or are likely to do so; or (c) evidence is given of an imputation about the other person made by the

defendant - (i) on being questioned under caution, before charge, about the offence with which he or she is charged, or (ii) on being charged with the offence or officially informed that he or she might be prosecuted for it. (4) In paragraph (3)(a) "evidence attacking the other person's character" means evidence to the effect that the other person - (a) has committed an offence (whether a different offence from the one with which the defendant is charged or the same one); or (b) has behaved, or is disposed to behave, in a reprehensible way. (5) In paragraph (3)(c), "imputation about the other person" means an assertion to that effect. 13. The Crown said that they had known of the common assault committed by the Defendant as this case approached trial and had taken the view that it was not relevant to a matter in issue and accordingly had not made an application under the "propensity" provisions in Article 82F. However, Crown counsel put Defence counsel on notice that if the Complainant was asked about the incident at the Watersplash then the Crown may make an application to adduce this evidence under Article 82G on the footing that such evidence would be admissible if the Defendant had made an attack on another person's character, which the Defendant plainly had by asking the Complainant about this matter and putting it to her that she had assaulted another woman in the Watersplash. 14. The Crown said in the circumstances Article 82G was plainly engaged, and the evidence of the Defendant's conviction was prima facie admissible subject to the Court's discretion to exclude such evidence under Article 82E(2) if it appeared 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; and its additional discretion to exclude in similar terms under Article 76. The Crown concluded that the test for exclusion was not met in the circumstances of this case and that the jury was entitled to know the character of the person who had made this attack on the character of the Complainant. 15. The Defence objected to the admission of this evidence. Defence counsel said that the Complainant had accepted that she retaliated (suggesting that she was not acting in self-defence) and pushed the other girl over at the Watersplash and that without such evidence the jury would have been left with the wrong impression of the Complainant's character. It was said that the common assault conviction of the Defendant should not be adduced because it post-dated the end of the relationship and that this was not evidence either relevant to the case nor was it important explanatory evidence and should not be adduced because this was a different sort of incident from the once complained of - the Defendant was verbally abused by someone who he punched once in the face and the Defendant, when arrested, fully admitted the offence by his early plea. The Defence argued this allegation was not probative of the charge on the indictment and was not information the jury needed to know. Accordingly it was irrelevant. 16. In the circumstances, I agreed with the Crown that this evidence was prima facie admissible under Article 82G subject to the exclusionary discretion to which I have referred under Article 82E(2) and Article 76. 17. I had regard to both the terms of the relevant statutory provisions and indeed the specimen judicial direction suggested by the Crown Court compendium to which the Jersey courts frequently have recourse when considering bad character evidence owing to the similarity of the legislation in England and Wales. Bearing in mind the attack on the character of the

Complainant, it was not unfair for the Defendant's conviction to be admitted and I did not find that the admission of such a conviction would have such an adverse effect on the fairness of the proceedings that the Court ought not to admit it. Indeed, it did not have such an effect and the Crown did not ask the Defendant questions in relation to his conviction when he was cross-examined. Defence application to adduce hearsay evidence through the Defendant's mother 18. The judgment given by the Bailiff on 21 February 2023, to which I referred already, was in part concerned with the Crown's application to adduce hearsay evidence in the form of statements made by the Complainant to her manager at work and another person in relation to her complaint of assault. The Bailiff ruled that the terms of the complaint made to her employer should be admitted but the terms of the other complaint should not be admitted. In reaching his decision, the Bailiff considered the balancing factors under Article 64(2) of the Law. Those applications were made well before trial, were the subject of an appropriate application made by the Crown in writing pursuant to the terms of the Criminal Procedure Rules and were supported by a skeleton argument filed by the Crown on 15 December 2022 to which the Defence responded on 21 December 2022. 19. The Defence did not make any separate application to adduce hearsay evidence and although such applications can, of course, be made during the trial, it is generally less likely that late applications will succeed. 20. In the course of the Defendant's evidence, he said that after the alleged assault his mother came home and that he told his mother that he had acted in self-defence and it was necessary for him to do so. 21. When the Defendant's mother gave evidence she said that when she came home she saw the Defendant and the Complainant were upset; that she saw scratch marks on her son's body and that she told the Defendant to give the Complainant her telephone back. She made other remarks about the appearance of the Complainant and Defendant and gave evidence about the Complainant's mother's arrival at her home and the Complainant's mother taking the Complainant home. 22. There was then an attempt to adduce, through the mother, the Defendant's oral account to her as to what had happened earlier that day, i.e., as to the assault. There was no suggestion, nor could there be, that this was part of the *res gestae*. Such an account was agreed to be *prima facie* inadmissible hearsay. It was not suggested that the material amounted to a confession. 23. The Defence conceded they had made no application under the Law and gave an indication of the broad nature of what it was anticipated that the Defendant's mother might say in her evidence. Although the Defence did not identify the appropriate provision of the Law under which they made the application to adduce this evidence, it appeared that I should treat it as a late application to adduce hearsay evidence under Article 64(1)(D) of the Law which permits the Court to admit hearsay evidence if the Court is "satisfied that it is in the interests of justice for it to be admissible". The Court in such circumstances needs to consider the factors listed in Article 64(2). I concluded in the circumstances that such evidence would be of limited probative value and could only have been effectively undermined by cross-examining the Defendant, whose evidence had been completed without the Crown knowing of this application. Having regard to these matters and all the factors contained in Article 64(2), I was not satisfied that it was in the interests of justice

for this evidence to be admitted and declined to permit the Defence to adduce it.
Authorities AG v Withe

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