

JERSEY / JUDGMENT

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

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JUDGMENT

THE DEPUTY BAILIFF: 1. The Defendant pleads not guilty to an indictment containing two counts of committing an act of gross indecency on a child aged four at the date of the alleged offences. 2. On 13 th and 19 th March, 2014 I heard argument on the admissibility of an interview of the Defendant carried out under caution on Tuesday 20 th August, 2013 at 19.20 hrs. The decision that the interview was admissible was handed down on 20 th March, with reasons reserved. These are those reasons. 3. The interview was conducted by Detective Constables Alan Bale and Karen Sykes, and lasted approximately one hour. The Defendant had been in police custody since his arrest that afternoon. He was read his rights and waived his right to legal advice. 4. The Defendant, who is aged 39, contends that the interview is inadmissible because he was and is mentally vulnerable and was interviewed by the police without an appropriate adult, in breach of Code C of the Police Procedures and Criminal Evidence (Codes of Practice)(Jersey) Order 2004 ("Code C"). It is said that the Defendant is mentally vulnerable because he has a relatively low IQ with a full scale IQ of 78, which puts his overall level of cognitive functioning in the borderline range; and because on the Gudjonsson suggestibility scale the Defendant was assessed as being in the most suggestible 5% of the population; and on the Gudjonsson compliance scale his score was 15 out of a possible range of scores between 0 and 20, where scores of 15 or beyond are again above the 95 th percentile as compared with adults in the general population. Thus it was said that a man with a full scale IQ score of 78 who is particularly suggestible and compliant should be treated as mentally vulnerable and only interviewed in the presence of an appropriate adult. 5. For the purposes of assessing this challenge on a voir dire, I heard evidence from the investigating officers, from Dr Wolstenholme, the Force medical examiner who certified that the Defendant was fit for interview and from Dr Carstairs, a clinical psychologist who carried out the Gudjonsson tests and interviewed the Defendant generally. 6. The relevant provisions of Code C are as follows:- "Code C A code of practice for the detention, treatment and questioning of persons by police officers. ... 1.4 If an officer has any suspicion, or is told in good faith, that a person of any age may be mentally disordered or mentally vulnerable, or mentally incapable of understanding the significance of questions put to the person or his or her replies, then that person shall be treated as a mentally disordered or mentally vulnerable person for the purposes of this code. ... Notes for Guidance ... 1I "Mentally Vulnerable" applies to any detainee who, because of his or her mental state or capacity, may not understand the significance of what is said or his or her replies. "Mental disorder" is defined in the Mental Health

(Jersey) Law 1969 Article 1 as - "mental illness, arrested or incomplete development of the mind and any other disability or disorder of the mind" Where the custody officer has any doubt about the mental capacity of the detainee, the detainee should be treated as mentally vulnerable and an appropriate adult called." ... 1K It is important that the custody officer reminds the appropriate adult and the detained person of the right to legal advice and records any reasons for waiving it in accordance with Section 6 of this code." 7. Paragraph 13 of Code C provides in its material respects:- "13.1 A juvenile or a person who is mentally disordered or mentally vulnerable, whether suspected or not, must not be interviewed or asked to provide or sign a written statement in the absence of the appropriate adult unless Annex C applies. If the person is cautioned in the absence of the appropriate adult, the caution must be repeated in the adult's presence (unless the interview is by then already finished). ... 13B It is important to bear in mind that, although juveniles or persons who are mentally disordered or mentally vulnerable are often capable of providing reliable evidence, they may, without knowing or wishing to do so, be particularly prone in certain circumstances, to provide information which is unreliable, misleading or self-incriminating. Special care should therefore always be exercised in questioning such a person, and the appropriate adult involved, if there is any doubt about a person's age, mental state or capacity. Because of the risk of unreliable evidence it is also important to obtain corroboration of any facts admitted whenever possible. 13C The appropriate adult should be informed that he or she is not expected to act simply as an observer. The purposes of the adult's presence are, first to advise the person being questioned and to observe whether the interview is being conducted properly and fairly; and secondly, to facilitate communication with the person being interviewed". 8. The material parts of Annex E is in these terms:- "1. If an officer has any suspicion or is told in good faith that a person of any age, whether or not in custody, may be mentally disordered or mentally vulnerable, or cannot understand the significance of questions put to the person or his replies, then the person shall be treated as a mentally disordered or mentally vulnerable person (paragraph 1.4). ... 3. If the custody officer authorises the detention of a person who is mentally vulnerable or is suffering from a mental disorder the officer must as soon as practicable inform the appropriate adult of the grounds for the person's detention and his or her whereabouts, and ask the adult to come to the police station to see the person. If the appropriate adult is already at the police station when information is given as required in paragraphs 3.1 to 3.5 the information must be given to the detained person in his or her presence. If the appropriate adult is not at the police station when the information is given then the information must be given to the detained person again in the presence of the appropriate adult once that person arrives. (paragraph 3.8). 4. If the appropriate adult, having been informed of the right to be afforded facilities to consult a legal representative in private, considers that this right should be exercised, the provisions of section 6 of the code apply as if the mentally disordered or mentally vulnerable person had requested access to facilities to consult a legal representative in private. (paragraph 13.2). ... 7. If a mentally disordered or mentally vulnerable person is cautioned in the absence of the appropriate adult, the caution must be repeated in the appropriate adult's presence. ... 9. The appropriate adult should be informed that he or she is not expected to act simply as an observer. The purposes of the adult's presence are, first, to advise the person being interviewed and to observe whether or not the interview is being

conducted properly and fairly; and, secondly, to facilitate communication with the person being interviewed. [See Note 13C]. ... Notes for Guidance E2 The purpose of the provision at paragraph 3.13 is to protect the rights of a mentally disordered or mentally vulnerable person who does not understand the significance of what is being said to him or her. If the person wishes to exercise the right to facilities to consult a legal representative in private, the appropriate action should be taken and not delayed until the appropriate adult arrives. [See Note 3H]. A mentally disordered or mentally vulnerable person should always be given an opportunity, when an appropriate adult is called to the police station, to consult privately with a legal representative in the absence of the appropriate adult if he or she wishes to do so. E3 It is important to bear in mind that although persons who are mentally disordered or mentally vulnerable are often capable of providing reliable evidence, they may, without knowing or wishing to do so, be particularly prone in certain circumstances to provide information which is unreliable, misleading or self-incriminating. Special care should therefore always be exercised in questioning such a person and the appropriate adult involved, if there is any doubt about a person's mental state or capacity. Because of the risk of unreliable evidence, it is important to obtain corroboration of any facts admitted whenever possible. [Note 13B]." 9. I note that with an overall functional IQ score of 78, the Defendant is not in the same category as the Defendant in the case of AG -v- Coote

[2013] JRC 228 , and that the principles adopted by the Royal Court in that case, in particular with reference to the English Court of Appeal decision in R-v-Massih

[1986] Crim. LR 395 do not apply. 10. In R-v-Cox

[1991] Crim. LR 276, the English Court of Appeal was considering whether the trial judge wrongly admitted evidence of a confession by the defendant in circumstances where the defendant admitted the offence in the voir dire. The trial judge had therefore allowed the confession to be put in evidence upon the basis that it had been repeated before him by the defendant who was clearly telling the truth. On the application of Section 76 of the Police and Criminal Evidence Act 1984 , which in its material parts is in similar terms to Article 74 of the Police Procedures and Criminal Evidence (Jersey) Law 2003 ("PPCE"), Lord Lane CJ said this: "It seems to us that the true question was not whether the confession was unreliable or untrue so much as whether the confession, true or not, was obtained in consequence of anything done which was likely to render any confession unreliable, the burden being on the prosecution to prove beyond reasonable doubt that it was not so obtained. One emphasises as well the word "likely", the words "in the circumstances existing at the time." The judge, in our judgment, should have directed his mind to that likelihood, namely was it likely that the failure to have the appropriate adult present would result in any confession being unreliable; not whether the confession actually made was true." 11. Article 74 of PPCE provides in its material parts: "(2) If, in any proceedings where the prosecution proposes to give in evidence a confession made by an accused person, it is represented to the court that the confession was or may have been obtained -

a) By oppression of the person who made it; or

- b) In consequence of anything said or done which was likely, in the circumstances existing at the time, to render unreliable any confession which might be made by the accused in consequence thereof, the court shall not allow the confession to be given in evidence against the accused except and so far as the prosecution proves to the court beyond reasonable doubt that the confession, notwithstanding that it may be true, was not obtained as aforesaid." 12. Article 75 of PPCE in its material parts provides as follows: "(1) Without prejudice to the general duty of the Bailiff at a trial on indictment to direct the jury... on any matter on which it appears to the Bailiff appropriate to do so, where at that trial the case against the accused depends wholly or substantially on a confession by the accused and the court is satisfied that the accused is mentally impaired and that the confession was not made in the presence of an independent person, the Bailiff shall -
- a) Warn the jury ... that there is a special need for caution before convicting the accused in reliance on the confession; and
- b) Explain that the need arises because of the circumstances mentioned in this paragraph ... (3) In this Article - ... "Mentally impaired" in relation to a person, means that the person is in a state of arrested or incomplete development of mind which includes significant impairment of intelligence and social functioning." 13. I am satisfied that I should apply the principles of R -v- Cox (supra) in relation to matters arising under Article 74 of PPCE for the reasons the Lord Chief Justice gave, and because Article 74 contains the express language "notwithstanding that it may be true" . Accordingly, the question the Court has to decide is not whether the confession was true but whether it was likely to be unreliable in the context of the circumstances existing at the time. 14. I am approaching the question of the admissibility of the interview of the Defendant on the following basis:- (i) Has there been a breach of Code C because the interview took place without an appropriate adult being present? (ii) Was the confession likely to be rendered unreliable as a result of a breach of Code C, if one occurred, or in consequence of anything else said or done which was likely, in the circumstances existing at the time of the interview to render it unreliable? 15. There is a third question which arises from a different challenge made to the admissibility of the interview. Advocate Bell contends that it would be unfair to include the interview in evidence and it should therefore be excluded under Article 76 of PPCE. I will come to that later in this judgment. Any breach of Code C? 16. As I have indicated above, the Defendant was interviewed at 1920 hrs on Tuesday 20 th August, 2013. Detective Sergeant Ryan said that earlier that day he was notified by Detective Constables Bale and Sykes that the child's mother had stated that the Defendant may have some learning difficulties. As a result, Sergeant Ryan spoke to the arresting officers who apparently did not share these concerns although they had not spent much time with the Defendant as his home address was close to the police station. As a result of this information, Sergeant Ryan asked that the Defendant be examined by the Force medical examiner so that the Defendant could be assessed for fitness for detention, interview and whether or not he needed an appropriate adult. 17. In his evidence before us, DC Bale said that the child's mother had indicated that the Defendant was a bit slow. As a result, DC Bale had informed Detective Sergeant Ryan of this

information. He denied telling Detective Sergeant Ryan the Defendant had learning difficulties. Subsequently he was told that the Force medical examiner had said that the Defendant was fit for interview. Under cross-examination, the officer said that he did not have any suspicion that the Defendant was vulnerable. He merely passed the information on to his Sergeant. He had not met the Defendant before. The officer said that it was not clear to him that the Defendant was vulnerable. The officer had no concerns for the Defendant during his interview, despite what the family had told him. 18. DC Sykes said that she met the Defendant on the stairs on the way up to the interview. She was aware that the child's grandmother had made a comment that the Defendant was a bit slow and she had passed this comment onto Sergeant Ryan who had arranged for the Defendant to be examined by the Force medical examiner. She too told us that she had not told Sergeant Ryan that the Defendant had learning difficulties. As far as she was concerned, "a bit slow" could mean a variety of things. She had no concerns about the Defendant in interview, nor before it. She merely passed onto Sergeant Ryan a comment she had received. 19. DC Sykes said that during the interview she was not concerned about the questions or answers in any sense. She did not think that the Defendant was confused. 20. The child's mother made a witness statement at 3.05 pm on 20 th August, 2013. It was not completed until 7.10 pm. As the interview with the Defendant commenced at 7.20 pm, I proceed on the assumption that the officers were aware of the mother's statement at that time. Put in the more traditional form of language for a criminal case, I am not satisfied beyond all reasonable doubt that the officers did not have the benefit of this statement. In it the mother says this about the Defendant:- "X and me became closer friends again about two years ago. There was not any particular reason for this, it just sort of happened. I would describe X as not very confident. He is quite quiet. He always thought the world of me. I always felt sorry for him because he got picked on a lot. It was easy for others to pick on him because he never said or done anything back. I used to stick up for him. I have known X long enough to be able to say that he is lacking any social skills completely. He is intelligent but simply does not know how to deal with people, especially if he does not know them. He is different, would be the easiest way to describe him. ... I should explain that X is a big drama queen and panics a lot." 21. The mother's assessment of X was based upon the fact that she has known him for about 12 years. 22. The child's grandmother also made a statement on 20 th August, 2013. From the material before me, it is unclear when that statement was taken, but I have assumed, because there is no evidence to the contrary, that it was also available to the officers conducting the interview with the Defendant. In her statement, the grandmother says:- "I would say that X is a bit slow but not batty, he is the sort of person that you feel sorry for." 23. The child's grandfather made a statement on 9 th October, 2013. It was therefore not a statement that the investigating officers could have been expected to take into account. I mention it only because it nonetheless is a relevant statement for the purposes of the second question I have to consider, as it goes to the circumstances which existed at the time of the interview. In his statement, the grandfather says:- "I felt quite sorry for [X] because he was a nice guy but he was bullied and really lacked self-confidence... He is intelligent though he doesn't seem it because he lacks self-confidence so much and he kind-of mumbles." 24. It is

on the strength of these comments from people who know the Defendant well that Advocate Bell submits that there was a breach of Code C because the officers had a suspicion, or certainly should have had a suspicion, and/or had been told in good faith that the Defendant might be mentally disordered or mentally vulnerable. It was contended that paragraph 1.4 of Code C is mandatory. The officers, including the custody officer, should have had a doubt about the mental capacity of the Defendant, and he should therefore have been treated as mentally vulnerable and an appropriate adult called. Advocate Bell contended that the reason the absence of an appropriate adult is so important is that it is clear that the Defendant had not appreciated why it was in his best interests to have legal advice, and had he had legal advice, it is said that these admissions would not have been made. Advocate Bell submitted that the importance of the safeguards in Code C is emphasised by Annex E in that Code, which deals with the same mandatory provisions. 25. I also understood the defence submission to include the proposition that the report of Dr Carstairs, a clinical psychologist, on the Defendant showed that he was mentally vulnerable and therefore that there had been a breach of Code C. I wish to deal with that in relatively short order. I do not consider that there is a breach of Code C where information could not reasonably be known to the officer conducting the interview. A similar point arose in the case of AG -v- Coote

[2013] JRC 228 . In that case the only evidence before the Court as to the circumstances which affected the Defendant at the time of the interview was a psychological report prepared sometime after interview. There was nothing else which the officers could have been expected to take into account at the time of interview. In those circumstances, the judgment makes plain that there had been no breach of Code C because the officers could not reasonably have known or suspected that the Defendant was a mentally vulnerable person. Affidavit evidence from a psychologist which is produced after the event cannot in my judgment be relevant to support a contention that there has been a breach of Code C, although that evidence may well be relevant to a consideration of reliability under Article 74(2) of PPCE, or to an exclusion on the grounds of fairness under Article 76 of PPCE. For the same reason therefore I do not take into account the evidence of Dr Carstairs in relation to the psychological makeup of the Defendant when considering whether there has been a breach of Code C. I approach the assertion of a breach of Code C only on the basis of the evidence available to the officers at the time. 26. It is clear that this Defendant does not suffer from any mental disorder for the purposes of the Mental Health (Jersey) Law . It follows that the question for consideration is whether officers should have treated him as being mentally vulnerable, the definition for which is that the detainee, because of his mental state or capacity, might not understand the significance of what was said to him or of his replies. 27. In my judgment, assuming that the investigating officers knew of the statements of the child's mother and grandmother in full, there is not enough in there, of itself, to amount to statements made in good faith that the Defendant was mentally vulnerable. I do not regard the expression "a bit slow" as necessarily implying mental vulnerability. I accept that it might have placed the officers on enquiry as to whether he was mentally vulnerable. They dealt with that in the right way by referring the matter to

Sergeant Ryan, who dealt with the matter appropriately by asking for a report from the Force medical examiner. I emphasise that in reaching that conclusion, I do not suggest that the interviewing officers did not have to address their minds to the matter again. The obligations in Code C are continuing obligations on the officers which need to be taken into account at all times during the course of the interview. 28. By the time the interview came to be conducted the police had information from the Force medical examiner Dr Wolstenholme which confirmed that the Defendant was fit for interview. Dr Wolstenholme is a general practitioner in private practice, who has had particular relevant experience in the policing field since 2005 and was appointed as a Force medical examiner in 2013. She readily accepted in cross-examination that she did not have the same qualifications in psychology as Dr Carstairs. Her examination of the Defendant did not take very long. It seems to have taken a maximum of some 20 minutes and it may have taken as little as 12 minutes. She routinely conducts an assessment of fitness for interview, and whether an appropriate adult is required. 29. Dr Wolstenholme's normal practice is to speak to the police to obtain background information, and very often that takes some 15 minutes. On this particular occasion she took information over the telephone, because she was in practice at her surgery. For the purposes of her examination, she had a pro-forma fitness for detention and interview form which is described as having been designed on behalf of the Faculty of Forensic and Legal Medicine for use by forensic physicians (also known as police surgeons or forensic medical examiners). The introductory note says that the form is provided to assist forensic physicians in determining whether a person is fit to detain and interview. It is to be regarded as an aide memoire and it is therefore not necessary for all parts of the form to be completed. 30. Under the heading Background Information, Dr Wolstenholme noted that the Defendant had "? LD or similar, has been interviewed without appropriate adult in the past" . The form indicates that the reason for the examination was "interview" and "need for appropriate adult" . There is no doubt that Dr Wolstenholme was conducting the examination with those tests in mind. Her completion of the form indicates in relation to the Defendant's mental state that his body/eye contact was appropriate, his speech rate and volume was appropriate, that he was able to explain why he was at the police station and he understood the consequences of speaking with Dr Wolstenholme as against not speaking with her

- this meant that he realised that the ordinary doctor/patient relationship, which was confidential, did not apply to whatever he said to her. She entered the note on the form that he was "OTTP" , namely that he was orientated in time, place and person. As to cognition, she conducted a test on the Defendant - this was a modified mini-mental state examination, which is frequently used, as we understand it, for identifying whether a patient is fit to manage his or her own affairs. The Defendant had a score of 30 out of 30, which suggested there was no impairment of the Defendant's mental state at the time of his examination. The Defendant co-operated in the examination and it took little time to conduct the test. Dr Wolstenholme asked the Defendant whether he wanted an appropriate adult with him when questioned. On the basis of her examination, she did not think it was necessary, but she

asked him nonetheless and he declined. She made the entry that "R/V as needed" which she explained in evidence meant that it was always subject to review but on present information, an appropriate adult was not required. 31. Dr Wolstenholme did not have, of course, the advantage of the psychological report prepared by Dr Carstairs. However she said that the Defendant answered questions without reflecting back to her what she said to him, and she had no concerns about his mental vulnerability. She was pressed as to why the Defendant's custody record, which in this respect she had completed personally indicated that the Defendant was fit for detention and fit for interview, but did not indicate that he was fit for interview without an appropriate adult. She said in her evidence that there was a decision tick-box which was completed at the same time and therefore there was no need for her to make the entry twice. On that tick box form, she entered the information that in her view the Defendant was fit for interview without an appropriate adult. 32. I found that Dr Wolstenholme gave her evidence impressively and I accepted her answers. I thought she was right to say that she had generally did not press for information from third parties as to why the Defendant might or might not have been thought to have a learning disorder, because in her experience there might often be suspect motivations for such information to be provided, and it was important that she should approach her assessment as independently as possible. From the manner in which she gave her evidence, I was not surprised that she indicated that she tried to make her assessments efficiently and quickly, and I accepted that there is a large crossover with the assessments which general practitioners have to make in private practice. 33. Advocate Bell submitted that for the purposes of paragraph 1.4 of Code C, once an officer has been told in good faith that a person may be mentally vulnerable, the officer loses any discretion as to whether he should treat such a person as mentally vulnerable or not. I reject that submission. In my judgment, the purpose of Code C in the context of the present case is that officers are sensitive to the possibility that a person of any age may be mentally disordered or mentally vulnerable. If they suspect that that is so, then their subjective assessment governs the way they should behave

- they must trust their judgment in that respect, and once they suspect that a person is mentally disordered or mentally vulnerable, then they must treat such a person the way the Code provides for mentally disordered or mentally vulnerable people. Sometimes a police officer may have had no suspicions of his own, but is told by a person in good faith that someone who is in detention is mentally vulnerable or mentally disordered. Receiving such information may well lead the officer to have a suspicion that it may be true. On the other hand, it may simply put the officer on enquiry, which requires him then to take other steps to ascertain the position. In the present case the officers reported what they had been told to Sergeant Ryan who called in the Force medical examiner. In her view, the Defendant was fit for interview without an appropriate adult being necessary. In my judgment, in the circumstances of this case, that was quite sufficient to leave the officers without suspicion at the time the interview was started. They were not obliged to accept the views of the Force medical examiner, but they cannot be criticised if they chose to do so. 34. Advocate Bell submitted that the result of no appropriate adult being present was that the Defendant

agreed to proceed with the interview without legal advice. He referred to an exchange at the beginning of the interview in these terms: "Officer - do you require legal advice at this time? X (Defendant) - no. Officer - ok. What's the reason for not wanting legal advice at his this time X? X - Pff, not too sure. Officer - not too sure? X - um. Officer - but you, you don't need it at this point? X - no. Officer - alright that's great." 35. The interview then proceeded. 36. I do not regard an exchange of that kind, which is not at all unusual in my experience of reading transcripts of interviews between the police and defendants, as showing that the Defendant was mentally vulnerable. The defence submission seemed to be founded on the assumption that if a defendant did not want legal advice, he must be mentally vulnerable. I do not accept that. Defendants have a number of reasons why they do not want legal advice. Some of those are good reasons, and some are not. What I would say, however, is that while the fact that the Defendant has not given a good reason for not having legal advice does not put the interviewing police officers on the alert, the provisions of Code C nonetheless require them at all times to have regard to the possibility that there is mental vulnerability or mental disorder, and that possibility should regularly be kept under review in the course of their interview. 37. For all these reasons, I do not consider that the police breached Code C in the present case. Is the interview reliable for the purposes of Article 74? 38. It is certainly possible that on a strict construction of Article 74(2)(b), there must be something said or done to generate the confession which makes it unreliable, and that this is intended to go beyond simply the asking of questions and obtaining of answers - in other words that a breach of Code C or of some other code of conduct or of some other established principles must be shown before these statutory provisions come to be applied. However I do not approach it in that way. I give a wide construction to the language of Article 74(2)(b), and notwithstanding that I have found that the investigating officers did not breach Code C, I have regard to all the circumstances which existed at the time of the interview to consider whether the confession is to be regarded as unreliable as a result. In considering that question, it is for the prosecution to satisfy me to the criminal standard that the confession is reliable. 39. I have mentioned the case of R-v-Cox above. Advocate Redgrave has submitted that I am entitled to have regard to the admission which the Defendant made to the psychologist Dr Carstairs as evidence of the reliability of the admission which he made to the police, because the two admissions are in similar terms. It is said that this is a relevant factor not because it demonstrates the truthfulness of the confession to the police (which is clearly not a good reason upon which the confession can be treated as reliable, given the express language of Article 74(2)) but because it demonstrates the Defendant's willingness to talk about the incident which underlies the charges. In my judgment this is too refined an approach to take, and is in danger of confusing the truthfulness of the admissions, which is not a permissible test, with the reliability of the admissions, which falls to be assessed by reference to other criteria than its possible truthfulness. It may be that with a different factual matrix in another case I might be minded to accept the Crown submissions. In this case, it is not necessary for me to resolve the question, and I expressly make my findings without taking into account the fact that the Defendant made similar admissions to Dr Carstairs as he made to the police. 40. On this voir dire, the Crown adduced no expert

evidence to contradict that of Dr Carstairs. I have no reason therefore to approach Dr Carstairs' evidence on any basis other than that:- (i) The Defendant has an overall IQ of 78, and accordingly his overall level of cognitive functioning is in the borderline range. (ii) The Defendant is not a person with a learning disability, but he is likely to experience some difficulty in keeping up with his peers with a variety of situations that require thinking and reasoning abilities. (iii) The Defendant is highly suggestible and had a tendency to give in to leading questions, and to be susceptible to changing his answers in response to negative feedback. (iv) The Defendant is also markedly more compliant than the average adult, and would have a tendency to be frightened of authority figures and to accept what those in authority might tell him. 41. In fact the psychologist's conclusions are not very dissimilar to the conclusions of the child's mother and grandparents who, from their knowledge of the Defendant, had reached similar conclusions albeit differently expressed. 42. I therefore have approached the question and answer interview which took place against the background of these characteristics which the Defendant has, which were not challenged for the purposes of the voir dire, in order that I may assess whether, given these characteristics and all the other surrounding circumstances, the admissions contained in the interview are reliable. 43. First of all I do not consider there was any element of oppression in the sense identified in R-v-Prager [1972] 56 CR. App. R. 151 - questioning which by its nature, duration or other attendant circumstances (including the fact of custody) excites hopes (such as the hope of release) or fears, or so affects the mind of the subject that it will crumble and he speaks when otherwise he would have stayed silent. Prager, of course, was a case where the Defendant was in custody for quite an extensive period, maintaining denials for most of it, before eventually he made admissions. In this case, the Defendant was not in custody for very long, having been arrested during the afternoon of 20th August. Furthermore the interview only lasted an hour, and the admissions were made approximately half way through it. The transcript of interview runs to 44 pages. There is no doubt that during the first 20 pages, the interviewing officers did put leading questions to the Defendant, and did put him under pressure. They did not hesitate to express their view of what they had heard, and they were not concerned about putting direct and difficult questions to the Defendant, including statements expressly or impliedly doubting the answers which he gave. Nonetheless, despite the evidence of Dr Carstairs, the Defendant resolutely stood up to this questioning and maintained denials. There is then a passage in which the Defendant makes admissions. It comes as follows: "360(DC Bale) - coz she, she said to us that she'd seen your winky and she's asked you if she can touch it and you've said yes. What have you got to say about that? X - I (indistinct) would never do that. 360 - She's also been asked did it happen just the once and her exact reply was no it happens loads when X babysits me. Why would she make this up X? X - I don't know. 360 - Four year olds don't have the capacity to make things like this up or imagine this, these things. X - I understand that yeah. 360 - She doesn't know it's wrong, whereas you do because you are an adult. Why did it happen? X - I don't know. 360 - Was it, was it just [X] being curious? X - Don't know (indistinct) 360 - Why did you let her touch your penis? X - (indistinct) because she asked me to." 44. From that moment there are a number of further admissions. Towards the end of the interview however, the

questioning turned to whether the Defendant had a sexual preference for children, and whether he enjoyed the touching which took place. Despite a great deal of pressure, and despite leading questions and tagged questions, the Defendant resolutely denied any sexual preference for children, denied that he had taken advantage of the position and denied that he had acted with the child in any sexual way. When questioned about this Dr Carstairs said that she recognised that he had withstood pressure and questions in the earlier part of the interview, and in the later part of the interview, but she thought that his ability to withstand the later questions resulted from his abhorrence of the suggestions which the police officers were making. 45. Dr Carstairs is an expert witness. As is well known, expert evidence is permitted in a criminal trial to provide the Court with information or an opinion which is within the expertise of the witness and which is likely to be outside the experience and knowledge of the Court. It is quite common for such evidence to be given, but it nonetheless remains as part of the evidence as a whole in order to assist in relation to any particular aspect of the case. I have considered carefully the views which Dr Carstairs has expressed. There does not seem to be any doubt that the fact that test results might show a tendency to suggestibility or compliance does not necessarily mean that on every occasion that a person is interviewed, that tendency will be reflected in his answers. Indeed the question and answer interview of the Defendant shows that not to be so. In order to decide the reliability of the admissions against the backdrop of Dr Carstairs evidence therefore I have had to consider what explanation there might be for a conclusion that the Defendant was not suggestible for the first half of the interview, suggestible for some three quarters of the second part of the interview and not suggestible for the last part of the interview. I did not find Dr Carstairs explanation of this to be at all convincing and I therefore reach the conclusion that notwithstanding the Defendant might have a tendency to be suggestible and compliant, or might be regarded as more suggestible and compliant than the vast majority of the population, nonetheless the admissions which he made in this question and answer interview are reliable. I do not accept that a statement by a police officer that "four year olds don't have the capacity to make things like this up" acted on the Defendant so as to produce admissions which could not be relied upon, even, coming as it did, after approximately half an hour's questions in police headquarters. 46. I have gone on to consider any other factors which might affect the question of reliability, and in particular the absence of a legal adviser. At this point it is right in my judgment to recognise that the question is not whether the Defendant would not have made the admissions in question had a legal adviser been present and told him not to do so. The question is whether or not the admissions made can genuinely be treated as having been made voluntarily, so that they are a reliable expression of what he wanted to say. Had there been a breach of Code C, I would have had to consider whether the lack of an appropriate adult would have resulted in a legal adviser being present which would have resulted in the Defendant not answering the questions which were being asked. That of course is quite a hypothetical exercise, and it is one which needs to be approached in Jersey with some caution. 47. When a putative defendant is questioned in an English police station, he is made aware that any failure on his part to answer questions put to him may lead to adverse inferences being drawn by the Court or jury when the matter

comes to trial, if indeed it does. The result of that caution is that one cannot be sure that a lawyer advising his client in an English police station will routinely advise him to say nothing at all. Because there is the opportunity for adverse inferences, that may not always be the best advice. By contrast, in Jersey where there are no adverse inferences that can be drawn from a defendant's silence when questioned by the police, it is much more certain that the lawyer advising his client prior to a police interview would tell him to say nothing under any circumstances. His refusal even to answer questions as to his name could not be treated as evidence of anything, and could not give rise to any inference of guilt when an explanation was advanced to the jury that could have been advanced to the police at the beginning and checked out with care. This practicable difference is one that in my judgment would fall to be taken into account even if there had been found to be a breach of Code C. Because I have found that there has been no breach of Code C in this case, it is not strictly necessary for me to address this further. Had it been necessary, I would have considered that an argument that a lawyer would have advised the Defendant to say nothing and therefore no admissions would have been made would not have itself been a reason for suggesting that the confession should be excluded under Article 74(2) of PPCE. The reason for this is that although defendants might be expected to follow the advice of their lawyers, the fact that they have made admissions in the absence of lawyers does not mean that those admissions are in any sense not voluntary, or less reliable. Indeed the whole context of the interview which has been transcribed and which I have read suggests to me that the admissions which were made were entirely voluntary and reliable. There is no dispute that the Defendant has no learning disability and that he does have a basic level of understanding of questions - indeed that he is capable of understanding and answering simple questions. At the end of the day, although the consequences may potentially be serious, it is nonetheless a reasonably simple matter as to whether the Defendant knew he was being asked whether he dropped his trousers and showed his penis to the child, and whether she touched it. He had not been in custody long and an hour long interview is not oppressive. There is no suggestion that he is a person of vivid imagination. With such an essentially simple issue for him to deal with, there is no particular reason why he should suffer any distrust of his memory. He is in employment, and is not socially isolated. When one looks at the matter in the round, there seemed to me to be no doubt that the confession was reliable. 48. When cross-examined, Dr Carstairs indicated that she thought the page 21 passage which I have set out above is an area where the police questions were deliberately designed to extract a confession by subtle pressure. That contention was not really put to the police officers when they gave evidence, although it was said to DC Sykes that she placed the Defendant under pressure in a confused manner in a different part of the interview. Having looked carefully at the terms of the interview myself, I cannot see how one can reach the conclusion that the police questions were "deliberately designed to extract a confession by subtle pressure". 49. The suggestibility and compliance conclusions resulted from the use of tests designed by Dr Gudjonsson. I was told by Dr Carstairs that these tests are internationally accepted, and I accept that. Professor Gudjonsson is in particular known for his pioneering work concerning the issue of suggestibility, and is an internationally

renowned authority on police interviewing and the detention and treatment of suspects. 50. It appears to me that the correct approach to this issue is for me to ask myself whether I consider the prosecution have satisfied me to the criminal standard that the admissions are reliable. The Crown have so satisfied me. That of course does not prevent the psychological evidence being produced to the jury, and at that stage, the jury can be invited to determine whether the confession was involuntary, coerced and/or unreliable under the circumstances. 51. I have previously ordered an intermediary to assist the defence. The reasons for this have been set out in previous decisions. I have now received a copy of the intermediary report produced for the Defendant. It is prepared by C. The intermediary was not available for cross-examination by Crown Advocate Redgrave. Furthermore she does not hold herself out as an expert witness. In the circumstances I have noted the intermediary's report, which builds heavily on the psychological report of Dr Carstairs albeit the intermediary has had an interview with the Defendant personally as well, but I do not find that the contents of the intermediary's report affect my conclusion as to the reliability of the confession. 52. Advocate Bell made much of the absence of independent adults. To that extent it is perhaps interesting to note the contents of Article 75 of PPCE. This of course relates to mentally impaired persons and there is at least a doubt as to whether one would say that the Defendant falls into that category. Even if he does however and for this purpose giving the benefit of the doubt to him to assume that he does, the absence of an appropriate adult does not make the confession inadmissible, but there is a requirement upon the trial judge to give the jury a warning that there is a special need for caution before convicting the Defendant in reliance on the confession where the case against him depends wholly or substantially on that evidence. If Dr Carstairs gives evidence, that is a matter to be revisited on the preparation of my summing up. 53. I am invited by Advocate Redgrave to adopt the decision of the Court of Appeal of England and Wales in *Gill and Others-v-R*

[2004] EWCA Crim. 3245. In essence, I have to consider:- (i) When an application is made under Article 74, the Court does not consider the reliability of the confession which has been made but a hypothetical question namely whether in the circumstances prevailing at the time, there is a likelihood that any confession made at that time would be unreliable. (ii) The words "anything said or done" are wide enough to include an omission to interview a suspect without the presence of an appropriate adult in circumstances where the code of conduct requires one to be present. (iii) It may be material to consider whether a breach of the code has occurred but it is the consequences of the loss of the protection which the code intended him to have, not whether there has been a breach, which is relevant. (iv) The relevant question is whether, having regard to the purpose for which an appropriate adult is required, the absence on this occasion of the protection which such presence would have provided is likely to have rendered any confession made at that time unreliable. In short, would the presence of an appropriate adult have made any difference? 54. As was the position in *AG-v-Coote* (supra) I accept *Gill and Others-v-R* as good authority to follow in this jurisdiction, recognising always that one must be careful not to ensure that comments in one criminal case are of a general nature before they are

applied to the approach which is to be taken in another, as much may depend upon the particular factual matrix which applies in each case. Should the interview be excluded under Article 76 PPCE? 55. Finally I come to the question as to whether, having regard to all the circumstances, the admission of the evidence would so adversely affect the fairness of the proceedings that the Court ought not to admit the evidence pursuant to Article 76. If I had taken a narrow view of Article 74, there might perhaps have been some scope for having to consider this question in relation to Article 76. However, because I have taken a wide approach to Article 74, there does not seem to me to be any clear water between a decision taken under that Article as to reliability and a decision taken under Article 76 as to unfairness. In some jurisdictions there is a requirement for some causality between wrongful conduct on the part of the police and the making of the confession by the Defendant; but in Jersey and indeed in England and Wales, by virtue of Article 74 and Section 76 of the relevant legislation, there is no necessary link between police misconduct and unreliability. One can have a breach of Code C and yet the confession can still be reliable. One can have no breach of Code C, and yet the confession might still be unreliable. But of course a breach of Code C will always carefully be considered where there is an objection under either Article 74 or 76 of PPCE. 56. If the confession is reliable, and there are no other circumstances which might be material to considerations of fairness such as proven allegations of abuse of process of some sort or another, then prima facie it seems to me that there is nothing unfair in a reliable confession being put before the jury for consideration. I therefore do not find any clear water in this case between the consideration I have to give to the objections under Article 74 and those to which I should have regard under Article 76. I do not think that permitting the evidence to be given will adversely affect the fairness of the proceedings. 57. For these reasons, although there may be particular questions and answers which ought to be the subject of redaction, particularly those which refer to allegations of previous misconduct by the Defendant with his own children, which might be prejudicial and on the evidence before me have no probative value. I resolved on 20 th March, 2014, that the question and answer interview can substantially go before the jury. Authorities Police Procedures and Criminal Evidence (Codes of Practice)(Jersey) Order 2004. AG-v-Coote

[2013] JRC 228 . R-v-Massih [1986] Crim. LR 395. R-v-Cox [1991] Crim. LR 276. Police and Criminal Evidence Act 1984. Police Procedures and Criminal Evidence (Jersey) Law 2003. Mental Health (Jersey) Law 1969. R-v-Prager [1972] 56 CR. App. R. 151. Gill and Others-v-R [2004] EWCA Crim. 3245. Page Last Updated: 23 Sep 2016 BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII

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