

JERSEY / JUDGMENT

W -v- AG [2017] JCA 196 (22 November 2017)

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Court of Appeal 22 November 2017 Before : Nigel Pleming, Esq., Q. C., President; David Perry, Esq., Q. C., and; David Doyle, First Deemster and Clerk of the Rolls, Isle of Man. W -v- The Attorney General C. M. M. Yates, Esq., Crown Advocate. Advocate M. J. Haines for the Appellant.

JUDGMENT

perry ja: This is the judgment of the Court.

Introduction

1. In July 2017, following a five day trial in the Royal Court before the Deputy Bailiff of Jersey (T. J. Le Cocq) and a jury, the Appellant, W, was convicted of eleven offences of a sexual nature, committed over a period of six years between 1997 and 2003 against two complainants, Complainant 1 and Complainant 2. At the time of the offending both Complainants were young girls. The offences in relation to Complainant 1 were part of a sustained course of abuse and ten of the eleven offences of which the Appellant was convicted reflected this course of conduct. In the case of Complainant 2, the Appellant was convicted of a single offence of indecent assault. 2. The Appellant, who is due to be sentenced in December 2017, now seeks leave to appeal against his conviction on the basis of a single ground of appeal. The essential issue falling for the Court's determination is whether the Appellant was wrongly denied the opportunity to cross-examine Complainant 1 in relation to an allegation of rape she had made against another man, F, in August 2009. The Appellant contends that the allegation of rape made against F was false, and that permitting cross-examination would or might have had a bearing on Complainant 1's credibility as a witness. On this basis, the Appellant submits that his inability to cross-examine Complainant 1 rendered the trial unfair and, accordingly, his conviction is unsafe. We grant leave to appeal. 3. The issue raised by the appeal requires the Court to consider the protection afforded by the criminal trial process to those who make complaints of sexual abuse. As a general rule, the circumstances in which, in proceedings for sexual offences, a complainant may be cross-examined by or on behalf of the accused, about any sexual behaviour involving any other person, are closely circumscribed. There is however a distinction between cross-examination about any sexual behaviour of a complainant, and

cross-examination as to previous false complaints. As a matter of principle, a previous false complaint relates not to any sexual behaviour on the part of a complainant, it relates to a past untrue statement which would generally be relevant to credibility. The English and Jersey case law in this area makes clear that there must be a proper evidential basis for asserting both that the previous complaint had been made and that it was false. In the absence of such a proper evidential basis, the questioning would become questioning about other sexual behaviour, and this would not be permissible. In England and Wales the position in relation to other sexual behaviour is governed by statute and this is also the position in Guernsey and the Isle of Man, whereas the position in Jersey is governed by customary law. 4. It follows that the question raised by the appeal is whether there was a proper evidential basis for asserting that Complainant 1's allegation that she had been raped by F was false. Before addressing this question it is necessary to give a brief summary of the background beginning with the various parties to the proceedings in the Royal Court. The Appellant 5. The Appellant is now aged 51. He is the younger brother of Complainant 1's mother and it follows that he is Complainant 1's maternal uncle. At the time of the offending he was aged between 31 and 37 years of age. Complainant 1 6. Complainant 1 was born in 1987. At the time of the offending she was a child aged between 9 and 16 years. By the time of the trial she was aged 29. Complainant 2 7. Complainant 2 was born in 1990. At the time of the offending she was a child aged between 8 and 10 years. By the time of the trial she was aged 26. The Prosecution Case 8. The case for the Crown was that over a period of five to six years, between 1997 and 2003, the Appellant had subjected Complainant 1 to serious and sustained sexual abuse. The offending occurred at the Appellant's home, at which Complainant 1 would frequently visit and often stay overnight with her stepbrother, who was two years older. Complainant 1 had been systematically groomed to accept the abuse as it escalated and the offences began with instances of indecent assault and evolved into procuring acts of gross indecency and ultimately rape. 9. Complainant 2 was a close friend of Complainant 1. The offending in her case involved a single act of indecent assault committed at a time when she stayed overnight at the Appellant's home address with Complainant 1. This was reflected in Count 6 of the Indictment. The Indictment 10. The trial indictment contained a total of thirteen counts and the Appellant was convicted of eleven offences comprising eight counts of indecent assault (Counts 1, 2, 3, 6, 7, 8, 12 and 13), two counts of procuring acts of gross indecency (Counts 4 and 5) and one count of rape (Count 11). Disclosure of the Offending by Complainant 1 11. There is no doubt that Complainant 1 had experienced a troubled childhood. Her relationship with her mother was difficult, and by the time she was a teenager she was engaging in acts of self-harm. Medical records reveal that in 2007, during a consultation with her general practitioner, she alleged that, between the ages of 8 and 17, she had been abused by a "family member". 12. In August 2009, Complainant 1 made an allegation of rape against her then boyfriend, F. During the course of a police investigation into this allegation, Complainant 1 disclosed to the police that the Appellant had sexually abused her beginning when she was 8 years old and continuing until she was 16. She also reported that Complainant 2 may have been a victim of the Appellant's abuse. She was upset and crying at the time of the complaint and unsure whether she

wanted to take matters further. Despite being offered support, she withdrew contact with the police and declined to make a formal complaint. 13. The complaint against the Appellant resurfaced in early January 2016, when Complainant 1 for the first time disclosed to her mother what had taken place. She provided a detailed witness statement to the States of Jersey Police in January 2016. The Appellant's Arrest 14. The Appellant was arrested in January 2016 and interviewed under caution later that day. In the course of the interview he denied any sexual impropriety, although he did admit that Complainant 1 and her step-brother had often visited him at his home address and that they would frequently spend the night there, all three sharing the same bed. He described Complainant 1 and her step-brother as "mischievous" and "manipulative". 15. In a later interview under caution, in April 2016, the Appellant made no comment in response to the questions put to him. Proceedings in the Royal Court 16. The Appellant was indicted before the Royal Court in February 2017 and entered not guilty pleas to all counts on the indictment. 17. In advance of the trial, at an interlocutory hearing, held in July 2017, the Appellant applied for leave to cross-examine Complainant 1 in relation to the allegation of rape she had made against F in 2009. 18. In a careful ruling, dated 18 July 2017, (AG-v-W

[2017] JRC 111A) the Deputy Bailiff decided that there was no "sufficient" evidential basis to conclude that the allegation of rape made against F by Complainant 1 was false and, accordingly, he declined to permit questioning in relation to it. He did however accede to an application for leave to cross-examine Complainant 1 in relation to a false allegation made against the Appellant's lodger, which Complainant 1 had explained in a statement to the police as a "cry for help". The Defence Case at Trial 19. The defence case at trial involved a complete denial of any sexual impropriety. The Appellant's case was that the incidents involving Complainant 1 and Complainant 2 had not taken place. It follows from the verdicts that the Appellant's defence case was rejected and the jury were sure that Complainant 1 and Complainant 2 were truthful witnesses. The Ground of Appeal 20. The Appellant continues to submit that there was a proper evidential basis for concluding that the allegation of rape made by Complainant 1 against F in 2009 was concocted and, on this basis, he contends that the Deputy Bailiff was wrong to refuse the defence application to cross-examine Complainant 1 in relation to its falsity. In broad terms, it is submitted that the Deputy Bailiff failed to undertake a proper and correct evaluation of the relevant evidence and that, properly analysed, the evidence provided ample grounds to conclude that the complaint was false. The Complaint against F 21. Before we turn to consider the legal principles it is necessary to say something about the complaint of rape made against F. As we have noted, this was made by Complainant 1 in August 2009, when she was 21 years of age. She and F were girlfriend and boyfriend. In August 2009, Complainant 1 called the police and made a complaint of assault. She was at that time being treated for injuries in the Accident and Emergency Department of the General Hospital. During an intimate medical examination, she disclosed that she had been raped. She explained that she had not initially made a complaint of rape because she felt ashamed. According to her account of events, after a night out, during which she had been drinking, she visited the

address at which F lived with his parents. They spent some time talking in his bedroom and she drank a cup of tea. When she tried to leave, F pushed her onto the bed, bolted the door and forced her to have sex. After he had finished she was allowed to leave, although F then followed and assaulted her by punching her in the face, before returning to his home address. F was arrested and when interviewed he denied the offence. He claimed that he and Complainant 1 had had consensual sexual intercourse. His explanation for the injuries suffered by Complainant 1 was that they had been self-inflicted. 22. Complainant 1 made a witness statement later in August 2009. 23. A police report, prepared by an investigating officer, DCH, sometime later in 2009, contained a summary of the complaint and the results of the investigation. The police report raised a number of queries about the account of events given by Complainant 1, but at no point was it suggested that Complainant 1 had withdrawn the complaint or accepted it to be untrue. The Appellant relied on the contents of this police report, and the concerns and queries raised within it relating to Complainant 1's reliability as a witness, in support of his argument to the effect that there was a proper evidential basis for concluding that the allegation of rape was false. The Legal Principles 24. The circumstances in which, in proceedings for sexual offences, a complainant may be cross-examined, by or on behalf of the accused, about any other sexual behaviour or experience on his or her part involving the accused or any other person, were explained by Sir Michael Birt, Commissioner in *Attorney General v Correia*

[2015] JRC 061A . Although we have not heard full argument on the point, we adopt the approach of the Royal Court sitting at first instance in *Correia* and neither advocate sought to persuade us otherwise. The general rule is that evidence that a complainant engaged in consensual sexual conduct with persons other than the defendant is not admissible to support the inference that a person who has previously engaged in consensual sexual conduct is for that reason less worthy of belief as a witness. Such evidence is similarly not admissible to support the inference that a person who has previously engaged in consensual sexual conduct with other persons is for that reason alone more likely to have consented to the sexual conduct at issue in the trial. The purpose of the general rule is to counter what has been characterised as the "twin myths", namely that unchaste women are more likely to consent to intercourse and in any event are less worthy of belief: see A (No 2)

[2002] 1 AC 45 , per Lords Steyn and Hutton at paragraphs [27] and [47], respectively. The general rule also recognises that to allow victims of sexual abuse to be harassed unfairly by questions about their previous sexual experiences is unjust to them and may distort the course of the trial by distracting attention from the real issues which have to be determined. 25. An obvious exception to the general rule is evidence or questioning about a complainant's previous false complaints of sexual assault. A previous false complaint is not about sexual behaviour of the Complainant at all, at least not in any relevant sense: if the complaint is false, there was no sexual assault or abuse, the twin myths are not engaged, and the issue becomes one relating to the credibility of the complainant. 26. So far as this exception to the general rule is concerned, the case law makes it clear that

there has to be a "proper evidential basis" for asserting that the previous complaint had been made and that it was untrue. The reason for this is obvious; in the absence of such a basis the evidence or questioning would be about previous sexual behaviour and the general rule would be undermined. Whether there is a proper evidential basis is a fact sensitive exercise and a matter for the trial judge's judgment rather than discretion. 27. In support of his argument, the Appellant relies on observations made by the English Court of Appeal in *R v AM*

- [2009] EWCA Crim 618 . In that case, Dyson L. J. suggested (at paragraph 22) that a proper evidential basis: "... is less than a strong factual foundation for concluding that the previous complaint was false. But there must be some material from which it could properly be concluded that the complaint was false." 28. Dyson L. J. followed the approach in the earlier decision of *R v Garaxo*
- [2005] EWCA Crim 1170 , in which it had been stated that the test of a proper evidential basis is satisfied if there was material such that, depending on the answers given by the complainant in cross-examination, the jury could be satisfied that the previous complaint was untrue, or there was material which was capable of founding an inference that the complaint was untrue. These English authorities are not binding on us, are inconsistent with other English authorities and, with respect, we do not find them persuasive. 29. In *R v RD*
- [2009] EWCA Crim 2137, a case that was not put before the Deputy Bailiff, the English Court of Appeal held that the phrase "a proper evidential basis" was intended to require a much more solid foundation than cross-examination about inconsistencies between the complaint and other available evidence. In the course of giving the Court's judgment, Keene L. J. made clear that the trial process should not be used to investigate the truth or falsity of a previous allegation merely because there is some material which could be used to try and persuade a jury that it was in fact false. He went on to say this (at paragraph 18): "As was pointed out in the case of *R v E*
- [2004] EWCA Crim 1313 , if the cross-examination elicited assertions that the allegation had been true the trial court would have been faced with the dilemma of either letting those assertions of criminal conduct on the part of a named third party stand unanswered or "descending into factual enquiries with no obvious limit and wholly collateral to the issue in the case". We agree with those comments. Nor does the mere fact that the police decided that there was insufficient evidence to prosecute on the past complaint amount to evidence that the complaint was false." 30. He went on to say (at paragraph 19):- "In the present case there was no basis for expecting the complainant... to accept that her allegation of rape against the man... had been false. She had never in the past suggested anything of the sort. What was contemplated was in effect a trial of the allegation within this trial. Such a situation does not amount to the proper evidential basis contemplated in the authorities ..." 31. In our view, with respect to the Court of Appeal in *R-v-AM* , the decision in *R-v-RD* is correct and the reasoning there set out should be applied in this

jurisdiction. The test of a proper evidential foundation will not be satisfied where the defendant seeks to rely on inconsistencies in the complainant's evidence, or the implausibility of the complainant's account. It is important that the allegations of previous false complaints should be rigorously scrutinised. There must be material that is at the very least capable of founding an inference that the previous complaint is false without the need for the issue of falsity to be explored in cross-examination. In the absence of such material, a suggestion that the complaint is false is merely a matter of speculation. We consider that the test is only likely to be satisfied where there is evidence of an admission by the complainant that the earlier allegation was false, or where the complaint is, on its face, demonstrably untrue (and not simply implausible) and this approach is consistent with the English authorities decided before *R-v-AM* ; see *R-v-E*

[2004] EWCA Crim 1313 ; *R-v-V*

[2006] EWCA Crim 1901 . 32. More recently in *R v All Hilly*

[2014] EWCA Crim 1614 , Treacy L. J. said (at paragraph 14), that the ultimate question is whether there is material capable of leading to a conclusion that a previous complaint was false and went on to emphasise that courts should be ready to deploy a degree of understanding of the position of those who have made sexual allegations. This is an observation with which we wholly agree. In that case the English Court of Appeal rejected an argument to the effect that the proper evidential foundation was provided by the inherent unlikelihood of the allegations being true, as there was no basis to infer or conclude that the complaints were false. The Deputy Bailiff's Ruling 33. The Deputy Bailiff concluded that there was no proper evidential basis for concluding that Complainant 1's allegation of rape against F was false and his essential reasoning was as follows: (i) The allegation against F was not withdrawn, nor did Complainant 1 ever accept or suggest it was false. (ii) Although the police did not proceed further and the police report noted a number of concerns and queries concerning Complainant 1's account, none of these matters could by themselves, or cumulatively, provide a sufficient basis for concluding that the allegation was false. (iii) On the assumption that Complainant 1 would maintain that her allegations against F were true, "without calling [F] it is unlikely that the defence could reach the evidentiary position whereby a jury could be satisfied that the allegations were not true". We deal with this final point at paragraph 40 below. Decision 34. In our view the Deputy Bailiff properly came to the decision that the material relied on by the Appellant did not satisfy the necessary evidential test. There was no basis for expecting that Complainant 1 would accept that the allegation against F was false. Nor did the matters contained in the police report provide a sufficient evidential basis to permit cross-examination. The 'concerns and queries' were of a type that are commonplace in allegations of rape, but in themselves they provided no basis for inferring or concluding that the allegation was untrue. The position in this case is no different from the position confronting the English Court of Appeal in *R v RD* , supra: what was contemplated was in effect a trial of the allegation of falsity within the trial proper in an effort to persuade the tribunal of fact that it was false. Such a situation does

not amount to the proper evidential basis and the cross-examination was properly disallowed. 35. In summary, we are satisfied that the Deputy Bailiff was fully justified in reaching his conclusion and there is no substance in the Appellant's argument. Fresh Evidence 36. Before disposing of the appeal it is necessary to deal with certain material that was not before the Royal Court. The material in question is contained in a letter, dated 5 September 2017, written by the Appellant's legal representatives and containing a summary of events, given by F in an interview he attended with the Appellant's legal representatives on 31 August 2017. The letter contains a declaration by F to the effect that it is an accurate summary of the meeting. The letter itself includes a statement by F that the sexual intercourse with Complainant 1 was consensual. The letter also states "For the avoidance of doubt, we are NOT asking you to make a sworn statement or to give evidence in this matter." 37. The power of this Court to receive fresh evidence is set out in article 34 of the Court of Appeal (Jersey Law) 1961 . As this Court noted in *Baglin v Attorney General*

[2005] JLR 180 , the normal practice is to prepare a signed statement or affidavit from the witness whose evidence is sought to be adduced. This is to ensure that the Court and the respondent are fully apprised of the evidence and its relevance to the appeal. 38. The test for admitting fresh evidence on appeal is well settled. In *Hume v Attorney General*

[2006] JCA 162 this Court noted the principles to be applied: (i) The evidence sought to be adduced should have been unavailable at the trial; (ii) The evidence must be relevant to an issue arising in the appeal; (iii) The evidence must be capable of belief. 39. Even where these criteria are satisfied, the Court is nevertheless required to consider the impact of the evidence on the safety of the conviction. 40. At the hearing of the appeal, Advocate Haines on behalf of the Appellant did not seek to argue that we should admit the letter as fresh evidence and nor did he seek to place any reliance upon it. In our view, this was an entirely sensible course to adopt. The terms of the declaration merely serves to strengthen our view that the decision of the Deputy Bailiff was correct and adds nothing to the denials F made when interviewed by the police in August 2009. The mere fact of his denial of rape does not provide a proper evidential basis for asserting that Complainant 1's allegation was false. If it were otherwise, the general restriction on adducing evidence or cross-examining would be circumvented in every case in which an allegation of sexual abuse is met with a denial. As we have made clear, the trial process is not to be used to investigate the truth or falsity of a previous allegation merely because there is some material, such as inconsistencies in a complainant's account, which could be used in an effort to persuade a court that it was in fact false. It may be that the Appellant felt encouraged to obtain the declaration as a result of the Deputy Bailiff's suggestion that the evidentiary position might be satisfied by calling F to give evidence. For the reasons we have given, this would have involved investigating the falsity of the allegation and there is nothing in F's denial that in itself shows the complaint to be untrue. To have called F to give evidence illustrates the danger identified in *R-v-RD* of embarking on a trial within a trial and would have the potential to distort the trial process.

Conclusion

41. In those circumstances, the appeal against conviction must be dismissed. 42. We are extremely grateful to Advocate Haines and Crown Advocate Yates for their helpful written contentions and oral

submissions.

Authorities AG-v-W

[2017] JRC 111A . Attorney General v Correia

[2015] JRC 061A . A (No 2)

[2002] 1 AC 45 . R v AM

[2009] EWCA Crim 618 . R v Garaxo

[2005] EWCA Crim 1170 . R v RD [2009] EWCA Crim 2137. R v All Hilly

[2014] EWCA Crim 1614 . R-v-E

[2004] EWCA Crim 1313 . R-v-V

[2006] EWCA Crim 1901 . Court of Appeal (Jersey Law) 1961. Baglin v Attorney General

[2005] JLR 180 . Hume v Attorney General

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