IN THE ROYAL COURT OF GUERNSEY

LAW OFFICERS OF THE CROWN **Prosecution**

-v-

"XY" **Defendant**

Application to admit Evidence

Application heard on: 9th November, 2016

Judgment handed down on: 24th November, 2016

Before: John Russell Finch, Esq., Judge of the Royal Court

Counsel for the Prosecution ("P"): **Crown Advocate C G Dunford**
Counsel for the Defendant ("D"): **Advocate R B Eeles**

Cases referred to in Judgment:

R v B (R.A) (1997) 2 Cr. App. R. 88;

R v Baird (1993) 97 Cr. App. R. 33;

R v Bedford (1991) 93 Cr. App. R. 113;

R v Cole (1941) 28 Cr. App. R. 43;

R v Lewis [1982] 76 Cr. App. R. 33.

DECISION

Introduction

1. D faces an Indictment now comprising 2 counts, which are denied (he has pleaded guilty to another 13 count Indictment with similar allegations): indecent assault on a 5 year old boy and another count for the same alleged offence later added. Essentially the allegations are that he touched the boy's penis whilst babysitting him. The pre-trial legal argument is restricted to whether the contents of two computer conversations with unknown persons should be

allowed in as evidence by P. The log of messages is appended to P's skeleton argument and amounts to three pages. D seeks to exclude them. The messages are dated early April, 2016, the time-period for the offences ends in March, 2016.

2. Both sides produced helpful skeleton arguments and attached authorities. Legal submissions were made in court on 9th November, 2016. An argument regarding an SAP level 4 video found on D's Kindle has been postponed to the trial. It is, as counsel agreed, difficult to make a ruling in advance of the ruling in advance of the Prosecution evidence and how the alleged facts emerge. The messages fall to be dealt with at this juncture.

The Messages

3. As indicated, they are dialogues between D and two unknown individuals, going over the names "Ska8ergal" and "blondeswfcgirl" respectively – their gender, age and personal details, of course, being unknown. The former dates from 16th April, 2016, the latter from 9th April, 2016.

   Dealing with "blondeswfcgirl" first, it seems the discussion is related to incest. The unknown party refers to them and D having a baby girl for D to have sex with and a son "*and you let him fuck me*". D responds "*Mmm that would be so hot baby … we could have a boy and a girl*". Later on D messages, "*Mmmmm, are you going to teach our girls how to riude (sic) their daddy*". In relation to "Ska8ergal", D says, "*You can do anything you want to me*" and adds, "*Yeah I have almost no limits*" and "*I am open to trying anything*".

Submissions

4. P suggests that there were many occasions when D was left alone with the complainant and that he was unable to resist his sexual urges in respect of young children. This interest is something that would assist the Court in its deliberations. P does not argue propensity but rather that he had a motive to commit a contact offence. P cited the English case of R v Baird (1993) 97 Cr. App. R. 308 (appended to the skeleton). There the Police found "voluminous" diaries at D's house containing numerous references to the two complainants "which indicated a strong sexual feeling towards them". It was accepted that at least most (D said all) of the entries were fantasies, but they were relied on as corroboration of indecent assault allegations. On appeal, D submitted these entries were evidence of inclination and neither corroborative nor admissible. Nolan LJ commented:

   > "We do not agree. The expressions of sexual attraction and motive in relation to these two boys, coupled with the admitted physical contact through play-fighting, went far to rebut the defence of innocent association."

   In his written skeleton, at paragraph 17, Crown Advocate Dunford concluded by stating:

   > "It is submitted the Jurats could be directed adequately to stray away from a forbidden line of reasoning that simply because D engages in explicit messaging … he must have committed this offence."

5. On behalf of D, it was emphasized that the messages post-date the alleged offence period. The start date is as far back as April 2014, a "potentially significant gap in time" which "militates against the admission of this evidence". D also went over the contents of these messages. P had drawn attention to the "... *I have almost no limits*" comment, but this had to be construed in context. It is a sexual conversation between the parties about their sexual activity and does not relate to any motive for D to indecently assault a young boy. The prurient conversation about incest is initiated by the other participant and nowhere is there anything demonstrated by D about assaulting young boys. There is no direct reference to this

type of activity. The defence in the case will be a complete denial, not mistake or innocent explanation. The defence cite the case of R v Lewis [1982] 76 Cr. App. R. 33, where evidence of a disposition towards paedophilia was put forward to rebut a defence of innocent, association or accident in a case involving indecency with children (tab 8 of D's authorities). The court decided that the evidence was inadmissible in respect of a count denied in its entirety. The appeal was dismissed as this had been made clear in a careful summing-up. This is consistent with the older case of R v Cole (1941) 28 Cr. App. R 43 (D's tab 6). (In R v B (R.A) (1997) 2 Cr. App. R. 88 the point was made that similar fact evidence must be similar. Possession by D there of homosexual magazines was inadmissible on charges of indecent assault on his two grandsons that were completely denied).

Observations

6. As has been pointed out in other decisions, Guernsey does not have the complex system of "gateways" set out in the English legislation. Accordingly recourse has to be had to the common-law position and cases decided under it. To admit this type of evidence it must be (a) relevant and probative in respect of an issue in the case, and (b) more probative than prejudicial. So that the evidence may be relevant to prove intention or motive, to support an identification, or rebut a defence such as accident. "It is essential to identify the issue to which the evidence is directed or the purpose for which it is sought to be adduced" (R v Bedford (1991) 93 Cr. App. R. 113 at 116).

7. A careful reading of the messages does not demonstrate a propensity to indecent assault on young males. But even more so, the material is inadmissible when the defence is a straight denial (see, e.g. R v Cole above). Even if some probative value could be obtained the effect would be disproportionately prejudicial. The messages are unpleasant and lewd. If allowed, they would have just the tendency to cause the conclusion that D is an oversexed person with offensive ideas and therefore more likely to commit the offence that has always been guarded against. But that stage should not be reached in view of the defence of absolute denial. Accordingly this material is to be excluded as part of the Prosecution case. If D changes his mind and goes into the witness-box then, depending on the account he gives, the question of rebuttal might have to be carefully considered.

8. Application refused.

J R Finch
Judge of the Royal Court