



The Law Officers of the Crown v Monday
Royal Court
28th June 2017

JUDGMENT
46/2017

Application on the admissibility of evidence

IN THE ROYAL COURT OF GUERNSEY

Between:

THE LAW OFFICERS OF THE CROWN

Prosecution (“P”)

-and-

DARREN PAUL MONDAY

Defendant (“D”)

Application on the admissibility of evidence

Application heard on: 22nd May, 2017

Decision handed down on: 28th June, 2017

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

Counsel for the Prosecution: Advocate R J Calderwood

Counsel for the Defendant: Advocate L C Roffey

Statutes and cases referred to in Decision:

The Police Powers and Criminal Evidence (Bailiwick of Guernsey) Law, 2003, Section 78;

Criminal Justice Act, 2003, Section 120;

ES v The Crown [2004] EWCA 1320;

Fox v General Medical Council [1960] 1 WLR 1017;

The Queen v HRA [2008] VSCA 56;

R v Baird [1993] 97 Cr App R. 308

R v Birks [2002] 2 Cr App R. 7;

R v Lillyman [1896] 2 QB 167;

R v Osborne [1905] 1 KB 551;

R v Oyesiku 56 Cr App R. 240;

R v Robertson ex parte the Attorney-General [1991] 1 QdR 262.

Archbold paragraphs 8-108 to 8-109.

DECISION

1. D's trial is due to be set down. He faces an Indictment comprising 9 counts: counts 1-4 relate to the possession of indecent images of children and guilty pleas have been entered; counts 5-9, which are the subject of the application under consideration, relate to an alleged sexual relationship with the complainant, when she was 14-15 years of age. These counts are denied. Counts 1-4 are not relevant to this application. The dispute concerns the following proposed pieces of evidence:

(i) the complainant's cousin states that the complainant told her at the time the alleged unlawful relationship was taking place (2004-5) that D had asked her:

"... to write everything about the abuse from her father and he had paid her £100 for it. She said that [D] had said he wanted to masturbate over it. I can't recall if [the complainant] expressed how she felt about doing that." (First statement, page 1, paragraph 6);

(ii) also:

"[the complainant] mentioned that someone, I can't recall if she said it was [D], had asked her to buy a fancy dress school outfit from a shop on the Bridge." (First statement, page 1, paragraph 2);

It is accepted on behalf of D that the cousin's evidence to the effect that she was told that the complainant and D had started a consensual sexual relationship is admissible as a recent complaint;

(iii) the cousin's second statement is claimed to be wholly inadmissible. This refers to a chance meeting between the cousin and her young daughter with D in which it is alleged D smiled in the daughter's direction whilst in the High Street. This gave the cousin some cause for concern so that she went to the Police and told them of the historic sexual allegations involving the complainant; and

(iv) a written item headed "Kiddie List" compiled by D. It is suggested the words:

"Leanne 5 years old get pic of er vagina and rub my dick on it."

should be removed. After this disputed content the complainant is named and her age given at the time of the alleged sexual offences. Leanne, it should be noted, is another person.

2. In respect of items (i) and (ii) the question for consideration is whether they can be admitted in accordance with the principles relating to recent complaint. For (iii) and (iv) the main issue is relevance and prejudice. Recent complaint will be considered first. This limited exception to the hearsay rule was described, the textbooks say, as a "perverted survivor" of the hue and cry rule, by Justice O W Holmes. In England it has been refined and reformed by virtue of section 120 of the Criminal Justice Act, 2003. Guernsey remains subject to the common law requirements set out in English cases such as R v Lillyman [1896] 2 QB 167 and R v Osborne [1905] 1 KB 551. The position in England had become highly technical and rather artificial, but that is the background against which the present case must be considered now.

3. In paragraph 3 of P's skeleton, the common-law rule is concisely set-out:

- (a) The evidence is admissible to demonstrate consistency in the complainant's account, not the truth of what was said. (This requires rather involved elucidation in directions to the jury with which issue the Judicial Studies Board manfully struggled in England until the law was reformed).
 - (b) It is limited, despite earlier attempts to extend it, to sexual offences. (This is a reflection of its possible historical origins and not of logic).
 - (c) The complaint has to be made within a reasonable time of the offence. (Although later cases stretched this requirement it still led to reluctantly artificial decisions such as R v Birks [2002] 2 Cr App R. 7 (P's tab B). The modern approach, going as far as it was possible whilst remaining faithful to the principles, is shown in ES v The Queen [2004] EWCA 1320 (P's tab c)).
4. In D's skeleton at paragraph 10, it is argued that item (i) did not form part of the "narrative" when the complainant made her complaint to her cousin and which is accepted as admissible. The Prosecution cannot be given carte blanche to adduce anything allegedly said to the cousin under the "umbrella" of recent complaint. P submits (paragraphs 9 and 10 of their skeleton) that the complaints were made contemporaneously with the alleged offending behaviour going on. Usually from the cases there is just one incident. In paragraph 28 of the ES case the complaint was similarly contemporaneous. This case also indicates that, contrary to D's assertions, a recent complaint does not have to describe the ingredients of the offence involved (see paragraphs 24-26) and the Australian cases cited there and approved. D also submits that P is inviting the trial court to conclude that the writing of a letter of a sexual content must mean that the complainant and D were having a sexual relationship, which is both "unfair and unsafe". P considers (paragraph 17) that these are requests that would not have been made by D but for that unlawful sexual relationship. P continues in the next paragraph, "The more specific the details, the greater the ability to evaluate consistency".
 5. When examining item (ii) D submits that it is of "crucial import" that the complainant cannot recall if it was D who asked her to buy a fancy dress school outfit. Hence consistency cannot be assessed. P responds that, if she comes up to proof it will be the complainant who will say it was D who made this request. Both witnesses will therefore be referring to the same person. In oral submissions D submitted that there can be no exception under the rule, as the cousin cannot say who made the request. In addition items (i) and (ii) do not fall into the "unlawful" category required from admissible recent complaints. Neither is an unlawful activity.
 6. In relation to the incident described in (iii), D does not accept the suggestion of looking at the cousin's daughter and smiling. Even if he, D, did so, that does not assist the Jurats in deciding if D was in an unlawful sexual relationship with the complainant in 2004/05. P argues that what is important is how the cousin felt about it (paragraph 29). Her motivation for making a complaint to the Police is directly relevant to her credibility as a witness. P is not going to argue that because D smiled in the direction of the cousin's daughter in 2016 he must have been involved in underage sexual activity in 2004. "Smiling at children is not evidence of paedophilia."
 7. Item (iv) is a note referring to a separate person aged 5, and D suggests cannot assist the Jurats in deciding whether D was in a sexual relationship with the complainant. It is not relevant evidence. Furthermore its prejudicial effect outweighs any probative value and therefore it should be excluded under Section 78 of the Police Powers and Criminal Evidence (Bailiwick of Guernsey) Law, 2003 ("PPACE"), or indeed common law. P submits that whilst this item is undoubtedly prejudicial, this is outweighed by its probative value. The disputed words show D's "Kiddie List" is clearly sexual in nature. After the reference to "Leanne" the complainant and her age at the time are set down, as P puts it (paragraph 32) "at the time she says she was a victim of sexual offences". This goes towards rebutting any

defence of innocent association and is clearly relevant as to motive. This is not a cloak for bringing in evidence as to propensity. The important fact is the name and age of the alleged victim appearing on the list.

8. In paragraph 30 in the judgment of Thomas LJ (as he then was) in the ES case, it is stated:

“It is not in our judgment necessary that the complaint discloses the ingredients of the offence; it will, however, usually be necessary that the complainant discloses evidence of material and relevant unlawful conduct on the part of the defendant which could support the credibility of the complainant.” (emphasis supplied)

The allegations in respect of items (i) and (ii) may be categorised as unpleasant and objectionable (particularly it might be thought in relation to (i), which is a highly disturbing set of circumstances). But they are not unlawful. The other question which is of concern is that the concept under examination is designated as “recent complaint”. The word “complaint” seems to be given its ordinary, natural meaning. In order to consider this aspect of the application it was necessary (in the absence of Guernsey or English decisions on the point) to travel, as did the English Court of Appeal in ES, paragraphs 24-26, to Australia. In the case of The Queen v HRA [2008] VSCA 56, the Court of Appeal of Victoria produced lengthy and valuable judgments on a child abuse case. In paragraph 60 of his (the main) judgment Kellam JA observed:

“The authorities establish that for evidence of complaint to be admissible it is essential that a grievance or an accusation be expressed. At least in Victoria it has been held that a mere narrative or report about an incident is insufficient to make the statement admissible.”

However, proper weight had to be given to the circumstance that the complainant is “a young and immature child, not an adult”. It cannot be expected that the response of a small child to a sexual assault will be the same as that of an adult”.

A case cited in that judgment to the same effect was R v Robertson ex parte Attorney-General [1991] 1 QdR 262, at 276 where Carter J emphasized that a “complaint” was not necessary from a young girl, where there had been a “recitation” of what the accused was alleged to have done to her. In those circumstances a “mere narrative” was acceptable. These persuasive observations from eminent Commonwealth courts therefore demonstrate that a narrative is admissible, as opposed to a complaint – but only where there is a young witness; in other words a small child. That is not the situation here, where the complainant was at the material time a teenage girl who described a consensual sexual relationship with D. So, in being faithful to the present state of the law in this jurisdiction (i) and (ii) are neither unlawful nor complaints, and thus do not fall to be admitted under the rules relating to recent complaint. It is not necessary to consider the equivocal nature of the evidence in (ii) insofar as it may relate to D or not.

9. However, the proposition put forward by P in paragraph 23 of the skeleton is also relevant to this material. It is submitted that the evidence given by the complainant of these two matters is relevant and admissible. It is not hearsay and “it would plainly be relevant” as it explains the nature of the sexual relationship alleged between the complainant and D. From the complainant’s mouth it is direct evidence and a narrative of facts relevant to the relationship. Going further, the excerpt from *Archbold*, paragraphs 8-108 to 8-109 headed “Statements rebutting an allegation of recent fabrication” is also potentially applicable, as put forward by P. In accordance with what was said in Fox v General Medical Council [1960] 1 WLR 1017 and 1025 PC, as explained in R v Oyesiku 56 Cr App R. 240 at 246, should the complainant’s account be challenged in cross-examination as a recent invention then this account may be supported by evidence of earlier statements made to the same effect. These propositions are

clear. The latter case shows that great care must be exercised in deciding this, and sets out the approach to be followed. So that, e.g. the earlier statements must, “having regard to the time and circumstances” rationally tend to answer the attack. P’s submissions here are in accordance with authority and accepted.

10. In relation to the chance meeting (item (iii)) it is plainly neither proper nor indeed intended by P to infer anything to D’s disadvantage from the (harmless objectively) act of allegedly smiling at the cousin’s young daughter. What is relevant, as P argues in paragraph 29 of the skeleton, is what the cousin felt about it, which led to her going to the Police regarding the allegations now before the court. After all, it was a long time before the cousin came forward about these allegations and her motive is relevant. Removing the explanation from her evidence would be incomplete and misleading. What will be needed is a firm direction on this part of the evidence, so that the Jurats do not make any unwarranted inferences to D’s detriment and the facts placed in a correct context. Experience shows (as the Royal Court and Court of Appeal have said) that the Jurats can be relied upon to accept this.
11. The question of what D wrote as the “Kiddie List” (item (iv)) requires balancing prejudicial effect against probative value. As P reminded the court, all evidence is prejudicial and fairness must be aimed at not only for the defence, but the Prosecution. P’s suggestion (paragraph 34 of the skeleton), that the fact that the complainant’s name and age appears on a (with the disputed material left in) sexual “Kiddie List” rebuts any suggestion of innocent association. D’s submission (at paragraph 14 of the skeleton) that such a note could not assist the Jurats in their task is not viable. As P submits, the list provides “essential context to a list specifically naming her” (i.e., the complainant) (paragraph 37 of the skeleton). If the sexual reference was taken out the exhibit would be misleading. P refers to R v Baird [1993] 97 Cr App R 308 at 317 (tab D), (“innocent” activities considered in the light of sexual references in diaries). As a matter perhaps, of common-sense, the reference to the complainant should be seen in context. For the sake of completeness it should be mentioned that exclusion under Section 78 of PPACE on the ground of unfairness is not appropriate due to the potential probative value. Indeed the Section 78 considerations are very much the same as the points set out generally in relation to fairness, both require balancing the various factors involved on the particular facts of the matter. The common-law position is the same.

12. Accordingly:

- (i) Items (i) and (ii) are not admissible in the evidence of the cousin to whom the remarks were made. They are admissible in the complainant’s evidence and may be admitted to rebut suggestions of recent fabrication;
- (ii) Items (iii) and (iv) are relevant and admissible. Their probative value in all the circumstances outweighs any prejudicial effect. In relation to all four matters specific directions will be needed so that they may be properly and fairly assessed by the Jurats.

J R Finch
Judge of the Royal Court