[2019]GRC046

THIS DECISION AND THE APPENDIX
CAN BE PUBLISHED AND REPORTED
BUT THE IDENTITY OF THE COMPLAINANT CANNOT BE DISCLOSED

IN THE ROYAL COURT OF GUERNSEY

Between: **THE LAW OFFICERS OF THE CROWN**

-v-

"D" **Defendant**

Applications on behalf of the Defendant
in relation to evidence and stay of proceedings

Application heard on: 9th October, 2018

Decision handed down on: 5th November, 2018

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

Counsel for the Law Officers: Advocate R Calderwood

Counsel for the Defendant: Advocate P T R Ferbrache

Cases and Materials referred to:

Law Officers v Alvarez (Royal Court 25.09.12);
Law Officers v Guest 2003-4 GLR N [7];
Law Officers v Taylor 2011-12 GLR 81;
Taylor v Law Officers 2007-8 GLR 207;
DPP v Fell [2013] EWHC 562 (Admin);
Noor Mohammed v The King [1949] AC 182;
R v Brewster [2010] EWCA Crim 1194;
R v Crawley [2014] EWCA Crim 1028;
R v D [2009] EWCA Crim 2137;
R v Davarifar [2009] EWCA Crim 2294;
R (Ebrahim) v Feltham Magistrates' Court [2001] 1 All ER 831;
R v Gunwardene [1951] 2KB 600;
R v H [2004] 2 AC 134;
R v Murphy [2014] EWCA Crim 1457;

R v Pope [2013] 1 Cr App R. 214;
R v Richardson, R v Longman [1969] 1QB 299;
R v Rookwood (1696) 13 St Tr 139;
R v RT, MH [2001] EWCA Crim 1877;
R v Salt [2015] 1 WLR 4095;
R v Scott [2009] EWCA Crim 2457;
R v Shah [2002] EWCA Crim 1623;
R v Telford Justices ex parte Badham [1991] 2 QB 78;
R v Watson (1817) 32 St Tr 1.
The Criminal Appeal Act, 1907;
The Criminal Appeal Act, 1968;
The Court of Appeal (Guernsey) Law, 1961, Section 25(1);
The Criminal Justice Act, 2003, Section 100;
The Youth Justice and Criminal Evidence Act, 1999, Sections 41-43;
The Criminal Justice (Sex Offenders and Miscellaneous Provisions) (Bailiwick of Guernsey) Law, 2013, Section 42.
The (Second) Report of the Commissioners (1848);
The Protocol for the Control and Management of Unused Material in the Crown Court.
The European Convention on Human Rights, Articles 6 and 8.
Stephen's Digest of the Law of Evidence;
Archbold (2019), paragraphs 8-287 and 8-288;
Blackstone (2018) paragraphs D3.87, D3.88 and F2.36.

DECISION

Background

1. The defendant ("D") applies to the Royal Court to:

    (i) stay criminal proceedings against him as an abuse of process; or
    (ii) if unsuccessful, pose questions to the complainant under Section 42 of the Criminal Justice (Sex Offenders and Miscellaneous Provisions) (Bailiwick of Guernsey) Law, 2013; and
    (iii) exclude evidence relating to a condom located during the Police investigation of the case.

    At this stage it is only necessary to state that the Indictment comprises an allegation of indecent assault from 2016 and earlier "historical" complaints, including rape, dating from the 1990's. The Defence case is that the complainant has lied and made all the allegations up. The two main protagonists are cousins. The historic allegations refer to a period when the complainant was a child aged around 9 to 11. Oral argument took place on 9th October, 2018 and both the Defence and Prosecution had earlier put in comprehensive and detailed skeleton arguments with supporting authorities and documentation. A good deal of ground was covered, but it is proposed to deal with the main questions without necessarily covering every subsidiary point. It is appreciated that this is a serious case for both main individuals and potentially devastating to D if any of the allegations against him are proven to the relevant standard.

2. In his submissions, Advocate Ferbrache, with typical frankness, alluded to the Guernsey legislation on criminal appeals. Reference was made to the Court of Appeal decision in Law Officers v Guest 2003-4 GLR N [7]. The ratio in this case, which obviously binds this court, is that the Court of Appeal is unable to interfere in a criminal case if the summing-up is sound unless the verdict is obviously wrong. The wording of section 25(1) of the Court of Appeal (Guernsey) Law, 1961 follows the Criminal Appeal Act, 1907, so there is no concept of "lurking doubt", in effect of a conviction being "unsafe". It was therefore necessary for this Court to ensure that D suffered no unfairness that would be difficult to remedy on appeal following a full trial. (In Guest the Court of Appeal would have quashed the conviction, originally in the Magistrate's Court and upheld in the Royal Court, had the wording of the statute followed that in force in England. However, with great respect, the Court of Appeal rather fell into the trap of trying the case on the facts without seeing and hearing the evidence. The more recent English case of R v Pope [2013] 1 Cr. App R. 214 shows that under the English Criminal Appeal Act, 1968, such a conclusion can only be reached "in the most exceptional circumstances and even more exceptional if the attention of the court is confined to a re-examination of the material before the jury" (Lord Judge CJ at paragraph [14])). The present Guernsey position is helpfully set-out by Beloff JA in Taylor v Law Officers 2007-8 GLR 207. Whilst greatly respecting Advocate Ferbrache's sentiments, the remedy is for the legislature, should any change be thought necessary. The duty of the present Court is to loyally apply the law as it stands. It is proposed to deal with the three main issues in this application in the order they were argued, noting that there is some intermingling between points (i) and (ii).

Abuse of Process

3. As was recognized, D bears the burden of establishing such abuse on the balance of probabilities (R v Telford Justices ex parte Badham [1991] 2 QB 78). There are two main categories of abuse of process:

   (a) cases where the court concludes that the accused cannot receive a fair trial; and
   (b) cases where the court concludes that it would be unfair for the accused to be tried.

   It is also worthwhile considering the observations of Sir Brian Leveson P in R v Crawley [2014] EWCA Crim 1028 at [18]:

   > "[T]here is a strong public interest in the prosecution of crime and in ensuring that those charged with serious criminal offences are tried. Ordering a stay of proceedings, which in criminal law is effectively a permanent remedy, is thus a remedy of last resort."

   As Advocate Ferbrache commented in his very thorough oral submissions, this is not an easy task. In very basic summary, the ground covered was not the most common situation of alleged delay, but failure by the Prosecution ("P") to disclose material, and failure to investigate certain alleged lines of enquiry. Again, these points are intermingled on the facts presented, although P deals separately with the duty to investigate and the duty to disclose.

4. In Guernsey disclosure was dealt with by Nutting JA in Law Officers v Taylor (another Taylor) 2011-12 GLR 81. This is also binding upon this Court and an attempt to set out the principles was made in Law Officers v Alvarez (25.09.12), paragraphs 4-5 and 7:

   > "4. In Guernsey there is no legislation providing a framework for disclosure by either side in criminal cases. The leading case is the recent decision in Taylor [2011-12

GLR 81]. The disclosure point is covered in para 131 of Nutting JA's judgment, as follows:

> "*We hold, therefore, that the duty of the Prosecution in Guernsey is to disclose any material which might reasonably be considered capable of undermining or weakening the case for the Prosecution or of assisting the case for the accused .....".*

Nutting JA cited with approval the words of Lord Bingham in R v H [2004] 2 AC 134 at para 35, highlighting the words:

> *"The trial process is not well served if the defence are permitted to make general and unspecified allegations and then seek far-reaching disclosure in the hope that material may turn up to make them good".*

5. 2 JA (at para 134) also alluded to the English Protocol for the Control and Management of Unused material in the Crown Court (drafted by Fulford and Openshaw JJ) with approval. Para 3 of that document states:

> *"However, it is also essential that the trial process is not overburdened or diverted by erroneous and inappropriate disclosure of unused prosecution material, or by misconceived applications in relation to such material".*

6. …

7. Para 63 of the Protocol is of particular importance. Part of it reads:

> "*Victims do not waive the confidentiality of their medical records or their right to privacy under Article 8 of the ECHR by the mere fact of making a complaint against the accused. Judges should be alert to balance the rights of victims against the real and proven needs of the defence. The court, as a public authority, must ensure that any interference with the article 8 rights of those entitled to privacy is in accordance with the law and necessary in pursuit of a legitimate public interest. General and unspecified requests to trawl through such records should be refused ....".*

Earlier on (at para 60) the Protocol states:

> *"It should be made clear, though, that 'fishing' expeditions in relation to third party material – whether by the prosecution or the defence – must be discouraged ……"."*

5. In relation to failing to obtain evidence, which mainly refers to ground (a) above, but can also cross over to ground (b), the main case in England is R (Ebrahim) v Feltham Magistrates' Court [2001] 1 All ER 831, summarized very helpfully in *Blackstone* at D3.86. Brooke LJ at [16] said that the starting-point must be whether there was a duty on the investigator to obtain and/or retain the material in question. This will be considered in due course. He added that if there was no such duty there can be no grounds to stay the proceedings for failure to do so. It has to be clear, moreover, that a defendant cannot be fairly tried. Fairness involves fairness to both the Prosecution and Defence and the trial process "itself is equipped to deal with the bulk of the complaints on which applications for stay are founded". At D3.87 of *Blackstone* another relevant case is cited: in D.P.P. v Fell [2013] EWHC 562 (Admin) at [15] Gross LJ observed that a stay is only to be granted in exceptional cases:

> "The party seeking a stay must make good to the civil standard that owing to the missing evidence he will suffer serious prejudice to the extent that no fair trial can be held and that accordingly, the continuance of the prosecution would amount to a misuse of the process of the court."

6. In relation to failing to disclose evidence the Guernsey courts must follow Nutting JA's exposition in Taylor (supra). More words of Gross LJ have to be considered, set out in *Blackstone* at D.388. He refers to a "wholesale failure on the part of the Prosecution to comply with its disclosure obligations", adding that the Prosecution then offering no evidence in accordance with the English guidance "seems to illumine that only rarely will recourse to an abuse of process argument be necessary or appropriate". In the present application the case of R v Salt [2015] 1 WLR 4905 gives some of the relevant factors to be taken into account. They include the gravity of the charges, the denial of justice to complainants, the necessity for proper attention to be paid to disclosure, the nature and materiality of the "failures", the conduct of the defence, the waste of court resources, the effect on the jury, and the availability of other sanctions rather than halting the proceedings.

7. One point made by P, in the skeleton argument at paragraph 32 is relevant to considering the specific areas of dispute. The complainant made her allegations as an adult, "If she is lying she is lying as an adult. There is no suggestion that she made a complaint against the Defendant as a child". On looking at what is available it is apparent that the complainant was disturbed and unruly when younger. This may well be down to her domestic circumstances. Also, there were occasions when she was violent. In argument, D referred to her "behaviour and psychological problems". Does this make her a person with a propensity to lie? On behalf of P (at paragraph 99 of the skeleton argument) it is averred, "If medical documentation had revealed a propensity to lie, they would have been retained and disclosed".

8. In relation to the complainant's medical records it is necessary to go once more to the ruling in Alvarez (supra) and the reasoning therein; particularly a witness's rights under Article 8 of the European Convention on Human Rights; see once more paragraph 7 of that decision. Paragraph 40 of D's skeleton refers to "medical records insofar as they pertain to her behaviour". However, all of the medical records were reviewed by the Guernsey Police and the Prosecution. None of those records were relevant and none passed the Taylor disclosure test. Paragraph 38 of P's skeleton lists questions that would, if positively answered, lead to disclosure. These relate to whether the complainant suffers from any condition which affects her memory, cause delusions or hallucinations, or leads to a tendency to lie. The Prosecution have asked such questions and consider "none of the materials pass the Disclosure Test". There is a childhood psychological report (see paragraph 28 of D's skeleton) mentioned in the Schedule of Unused Material. P states in paragraph 42 of the skeleton: "There is nothing in it that passes the Disclosure Test". The kernel, it may be said, of P's submissions in this area, including the disclosure of school reports, also requested on behalf of D is found at paragraph 48 of their skeleton:

> "It is understood that the Complainant had an unhappy childhood, perhaps in part due to a complete breakdown in her parents' relationship. The Prosecution would not agree that a reasonable tribunal could infer from the content of old school reports, no matter how negative, that an adult complainant has a propensity to lie about something as serious as an allegation that her cousin raped her."

This reasoning applies to school reports and the childhood psychological report. There is reference to a list of schools attended by the complainant. P has declined to hand it over as

the relevance "is not, and still is not, immediately apparent. A list of schools is just that". A request for clarification as to relevance has been made and further discussion is still possible.

9. The next issue concerns a letter allegedly sent by the complainant to D. A reference point for this is the statement from her father dated 10.12.2017 in P's bundle at Tab 6. Where does this take things? According to the statement the father received a call from D's mother (his sister) which appears to have been a tense conversation, occurring on the day D was arrested about a month previously. According to the statement D's mother accepted that the letter had been received and had read it but said words to the effect that it was a load of rubbish and they never did anything about it. There is also reference in a Facebook message from the complainant to D's wife sent three days after the last alleged offence (indecent assault) – "I have something I need to post to[D]" (Tab 7 of the bundle) in an evidently somewhat cordial conversation. The dispute is simply that D and his family say they definitely did not receive this letter, the complainant did not send it, ergo she has lied about this. Hence the Police should examine the complainant's computer. As P puts it, the letter, in effect, proves little or nothing. Receiving it does not impugn D, it is claimed and sending it does not prove it was true in what it allegedly stated. The Facebook conversation may be of some value, as it shows the complainant conversing with D's wife on a social basis shortly after the incident that allegedly precipitated these proceedings. The case of R v Shah [2002] EWCA Crim 1623 is also mentioned and will be touched upon later in this decision, at paragraph 13 in relation to words of guidance from Kay LJ.

10. Reference is also made to a poem disclosed by P. This is a juvenile effort referring in various ways to a person called "[S]". Again the question is posed as to "where this takes things". Originally the complainant said she did not write it, but might be mistaken, as it resembled her handwriting. She admitted subsequently, by e-mail that she may have written it. It was about "a crush or some sort of vendetta". The Police records show no complaint made against someone called "S". If so it would, as P accepts, be liable to disclosure. D submits that the Guernsey Police "did not investigate this note". Looking at this calmly and, one hopes rationally, P's frank observation in oral argument to the effect that this is an 11 year-old's "childish screed" is merited. Taking it further than the Police already have, falls, it is suggested, within the cautionary words of Kay LJ in Shah. D puts this in the context of the primary defence point that the complainant has a "marked propensity to lie". It was also said that no "normal" 11 year old would write that sort of note, which was produced to the Police by her mother. These matters must be looked at and put to the complainant, or else D would not get a fair trial, it was forcefully suggested. But it is very difficult to ignore Shah in this aspect of the case.

11. The complainant lived in ……from ages 12-16. A great deal has been made of an allegation she made in her 3rd ABE interview. The wording she employs refers, if accepted, to inappropriate behaviour, but very few sensible Prosecutors would consider it a case of indecent assault. It comprises holding the (then) child by the legs whilst on a man's lap. Very properly the Guernsey Police made enquires of the ……law enforcement authorities before anything came through on behalf of D. The……., National Police and Municipal Police and the courts were contacted and the complainant's name, it is stated, was checked against all data bases. No information could be found. A document came from D's Advocate written in ……and apparently referring to the complaint. There is, at present, no further information regarding the source or origin of this document and only an "unofficial" translation. D's Advocate has asserted that it is an official record (so he has been instructed) of the relevant investigation. The alleged perpetrator of this incident was named, contacted on behalf of D and is unwilling to assist. On the only information available at present this document seems to show that there was insufficient evidence to proceed. This is a long way removed from finding the complaint false or malicious. P points out correctly in paragraph 77 of the skeleton that "The Guernsey Police have no power to compel an unwilling witness

to provide a statement". Even if he did then the Jurats, it is submitted, would end up having a wholly undesirable "trial within a trial" if he came to give evidence. P suggests that the material put forward does not demonstrate that this complaint was found by the …….authorities to be devoid of merit. In R v D [2009] EWCA Crim 2137 (dealing with the English legislation on "gateways" – sections 41-43 of the Youth Justice and Criminal Evidence Act, 1999) it was held that the mere fact that the Police decided that there was insufficient evidence to prosecute does not amount to evidence that the previous accusation was false; the same applies to a CPS decision not to prosecute. R v Davarifar [2009] EWCA Crim 2294. More will be discussed in relation to this when D's application under section 42 of the Criminal Justice (Sex Offenders and Miscellaneous Provisions) (Bailiwick of Guernsey) Law is considered.

12. There is also a matter that has arisen in Guernsey family law proceedings in relation to a former…….. There seems to be no criminal complaint, there are no Police records referring to this. P states that, having reviewed these papers, they do not pass the Disclosure Test and "for the avoidance of doubt" they do not suggest that the complainant made a false allegation. Any disclosure, submits P, would "defeat the very object of the disclosure regime" (paragraph 61 of P's skeleton). The Guernsey Police did not deem it necessary to investigate this matter (dated around …… when there was a Final Order of the Royal Court) further in view of the content of the papers they have received and considered.

Was there a "Failure to investigate"?

13. The Ebrahim case has already been touched on in paragraph 5 above. Brooke LJ observed that the starting-point must be whether there was a duty on the investigators to obtain and/or retain the material in question. The position is made clear by the case of Shah, referred to at paragraphs 9 and 10 above, an authority produced by P. In paragraph 24 of the judgment Kay LJ states:

> "… Decisions as to whether to investigate or not are essentially matters for the police to make their minds up as a matter of judgment by investigating officers, and the court is always going to be very reluctant to intervene and suggest that an enquiry of some kind should have been made when none has been made."

And at paragraph 25:

> "We want to make it clear that it was never the intention, as we understand it, of these provisions (i.e. of the English Code of Practice) in some way that the defence could obtain a piece of information and then by sending it to the prosecution place upon them a duty to investigate matters in the hope that in some speculative way, it might produce further information that would assist the defence case …."

14. On behalf of P, Advocate Calderwood, towards the end of his oral submissions, stated that this has not been a "shoddy" Police investigation. D has not moved beyond speculation and, P suggests, this extends to speculation "that the Prosecution have declined to properly apply the Disclosure Test to these documents" (paragraph 93 of P's skeleton). The submissions put forward by P, written and oral, show that the question of the Police investigation, which is bound-up with the disclosure aspect of the case, has, on the facts there set-out, been satisfactorily addressed. This is not a case where any sharp practice or culpable failure has been shown. Taking a step back and looking at the case as it now appears, there is no unreasonable failure by the Police in the investigatory process. The quote from Ebrahim (above), with great respect to D's arguments, covers the present set of circumstances. There is (to again quote P's skeleton, at paragraph 79) no room for "a speculative search for evidence impacting on the complainant's credibility". One observation which does rather jar

is that made by P in paragraph 82 on the form of statements from D`s prospective witnesses; although put up as not being a "pedantic point", it does in practical terms rather resemble one. It is far from uncommon, indeed normal, to take proofs. The only reason for the statutory caption is (possibly) to expedite their admission as agreed statements. There is no obligation for that form to be used by the Defence in other circumstances. It is also taken for granted that with the vast experience of D's Advocate, the prospective witnesses are aware of the implications of giving false evidence.

Section 42

15. Section 42 of the Law is set out in full here:

"42. (1) In criminal proceedings in respect of a relevant offence –
(a) no evidence may be admitted, and
(b) no question may be asked in cross-examination,

about –

(i) any sexual experience or activity, or
(ii) lack of sexual experience or activity,

of the complainant, except with leave of the court.

(2) For the purposes of subsection (1), **"sexual experience or activity" –**

(a) means sexual experience or activity other than that which forms the subject matter of the charge, and
(b) includes sexual experience or activity –
(i) whether with the accused or with any other person, and
(ii) to which the complainant did not consent.

(3) The court shall not grant leave under subsection (1) unless –

(a) the court is satisfied that the evidence or question has significant probative value to a fact in issue or to credit, and
(b) the evidence is of, or the question is in relation to, specific instances of sexual experience or activity.
(c) the evidence sought to be admitted or the question sought to be asked has significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice, taking into account the matters set out in subsection (5), and
(d) the party seeking to admit the evidence or ask the question has complied with the requirements in subsection (6).

(4) Evidence of a complainant's sexual experience or activity is not admissible, or a question in relation to that sexual experience or activity shall not be asked, to support an inference that, by reason of the fact that the complainant has engaged in sexual activity or has had sexual experience, the complainant –

(a) is the type of person who is more likely to have consented to the sexual activity that forms the subject matter of the charge, or
(b) is less worthy of belief.

(5) In determining whether the probative value of the evidence sought to be admitted or the question sought to be asked is not substantially outweighed by any danger of prejudice to the proper administration of justice under subsection (3)(b), the court shall take into account the following matters –

(a) the interests of justice, including the right of the accused to make a full answer and defence,
(b) the distress, humiliation, or embarrassment which the complainant may suffer as a result of leave being granted,
(c) the need to respect the complainant's personal dignity and privacy, and
(d) whether there is a reasonable prospect that the evidence or question will assist in arriving at a just determination in the case,

and the court may take into account any other factor which the court considers relevant.

(6) The party seeking leave under subsection (1) must do so by application to the court in writing and must –

(a) set out –
(i) detailed particulars of the evidence sought to be adduced or of the question sought to be asked,
(ii) how the evidence or question has significant probative value to a fact in issue or to credit, and
(iii) the fact in issue to which the evidence or question is relevant (where it does not go to credit), and

(b) give a copy of the application to the other party at least 7 days before the hearing of the application, unless the court orders that it should be given at such time as it considers to be appropriate in the interests of justice in the particular case.

(7) The court shall hear an application to grant leave under subsection (1) in the absence of –

(a) the Jurats (where the court is the Royal Court of Guernsey, whether sitting as a Full Court or an Ordinary Court),
(b) the public, and
(c) the complainant.

(8) At the conclusion of the hearing of an application for leave under subsection (1), the court must make a determination whether or not to grant leave to admit the evidence, or allow the question to be asked, and must record –

(a) the reasons for that determination, and
(b) where the court grants leave –
(i) the nature of the evidence which may be adduced, or
(ii) the question, or series of questions, that may be asked the complainant."

16. D's submissions are set-out in paragraphs 95-100 of the skeleton and were dwelt on in oral argument at the hearing. It was suggested that without an order being granted in accordance with this section, D would be unduly restricted in proper cross-examination, in a case where

the allegations are wholly denied, if these points could not be put to the complainant. Reference was made to the matters already referred to above, in particular the …….incident, the letter and the allegation made against her father's…….. P resists this application very much along the lines of what has been referred to above. P claims that there is no evidential basis for the submission, the complainant's answer would be final, it being collateral and there being no evidence to contradict it, so there would be no benefit accruing to D. It is also suggested that the requirements specified in section 42(6)(a)(i) of the Law have not been met, i.e. "detailed particulars of the evidence sought or question to be asked". What is set out above, in effect, refers to section 42(5)(d) – "whether there is a reasonable prospect that the evidence in question will assist in arriving at a just determination in the case". D (paragraph 98 of the skeleton) mentions R v Scott [2009] EWCA Crim 2457. Under the English legislation (and the Guernsey section is more akin to the Canadian provisions), evidence of the complainant making false allegations of sexual misconduct against another person would have substantial probative value on credibility. One relevant test is in R v Brewster [2010] EWCA Crim 1194 at [22] (and it is stressed that this refers to section 100 of the Criminal Justice Act 2003 and Section 43 of the Youth Justice and Criminal Evidence Act, 1999), where Pitchford LJ said:

> "The question is whether the evidence of previous convictions, or bad behaviour is sufficiently persuasive to be worthy of consideration by a fair-minded tribunal upon the question of credit worthiness."

Specifically in relation to the "gateways" set out in Section 43 of the 1999 Act the case of R v RT, R v MH [2001] EWCA Crim 1877 is relevant. In putting questions about alleged previous false complaints there must be a proper evidential basis for asserting that any previous complaint was (a) made and (b) untrue (emphases supplied). Another, it is considered, instructive decision also under the English legislation was that in R v Murphy [2014] EWCA Crim 1457. It was proposed by the defence to bring in the complainant's bad character from her disturbed adolescence to show her motive in making the allegations and undermine her credibility. This included self-harming, drinking, drugs and public order offences. The Court of Appeal considered that satellite litigation needed to be controlled and the jury would have been overwhelmed by trying issues from her adolescence. The situation is akin to the present case; see the very clear observations of Beatson LJ at paragraphs 61-63 of the judgment on the facts of that case.

The Limits of Cross-Examination

17. This has been looked at already. P's skeleton at paragraph 108, refers to Scott (supra). At paragraph 41 Aikens LJ said:

> "… Evidence is only admissible in a criminal trial if relevant. The only possible relevance of that evidence or any cross-examination of the complainant relating to it would be to impugn the complainant's credibility. A judge has power to prevent cross-examination which can only go to the credit of a witness if the truth of the matter suggested would not, in his opinion affect the credibility of the witness concerned …"
> (The *Archbold* reference is now paragraph 8-276.)

And in the RT, MH case (supra) at paragraph 41 Keene LJ considered that:

> "The judge is entitled to seek assurances from the defence that it has a proper basis for asserting that the statement was made and is untrue." (emphasis supplied)

On the material available, as discussed above, it is very doubtful that any such evidential basis exists. The main element is the …….incident and it has already been stated (at paragraph 11 above) that there are severe limitations in its worth. The incident described is only debatably an indecent assault. The Police have made reasonable enquiries and there is, again with great respect, nothing there (or in any of the other incidents) that can, on what is put forward, properly be deployed to the detriment of the complainant. As for her troubles when younger, the reasoning in the somewhat analogous case of Murphy (paragraph 16 above) is persuasive. Putting the matter in rather simplistic terms, the fact this complainant was an obstreperous and a violent child, or a bad-tempered pupil, does not assist in determining the value of the complaints she has made as an adult. The "evidential basis" is accordingly not made out on these authorities.

Impeaching the Complainant as a Liar

18. As the textbooks say, witnesses may be called to impeach the veracity of a witness for the other side to prove that his or her general reputation is such they would not believe them on oath. In practice this is phrased by asking the witness "From your knowledge of X would you believe her on her oath?" They may not speak as to any particular matter of which he or she may be guilty (R v Rookwood (1696) 13 St Tr 139 at 211). A well-known English case is R v Gunewardene [1951] 2 KB 600. In giving judgment, Lord Goddard CJ noted that at first a witness called to impeach the testimony of another could only testify as to their general reputation, not state an individual opinion. The old case of R v Watson (1817) 32 St Tr 1 was referred to. A witness could be called to say he would not believe the impeached witness on their own but could not, in evidence-in-chief particularise the facts that caused this conclusion. The same position was set out in *Stephen's Digest of the law of Evidence*. There are various other cases of respectable antiquity to the same effect. A more modern leading English case is R v Richardson, R v Longman [1969] 1QB 299. Edmund Davies LJ gave this judgment, summarising the position under the common law as follows:

> "1. A witness may be asked whether he has knowledge of the impugned witness's general reputation for veracity and whether (from such knowledge) he would believe the impugned witness's sworn testimony.
> 2. The witness called to impeach the credibility of a previous witness may also express his individual opinion (based upon his personal knowledge) as to whether the latter is to be believed upon his oath and is not confined to giving evidence merely of general reputation.
> 3. But whether his opinion as to the impugned witness's credibility be based simply upon the latter's general reputation for veracity or upon his personal knowledge, the witness cannot be permitted to indicate during his examination-in-chief the particular facts, circumstances or incidents which formed the basis of his opinion, although he may be cross-examined as to them."

The position is helpfully summarized in *Archbold* (2019 edition), paragraphs 8-287 to 8-288.

19. It follows therefore, from very well-established decisions (and the Guernsey courts will regard the cases cited as of high persuasive authority) that D is entitled to call witnesses as to how they see the complainant's character, but this must be done in the way set-out e.g. in R v Richardson. The submission in P's skeleton at paragraph 27 is therefore properly based on how the law stands. P is entitled in cross-examination to go into the particular facts beyond the witness's opinion if counsel wishes to do so. It is a matter entirely for the good sense and mature judgment of D's Advocate whether witnesses will be called to answer the permissible question and be subject to any cross-examination thought appropriate. No opinion is expressed on this, which is a decision for those able Advocates conducting the case. But the limits on what can be asked and said in reply on this aspect of the case are firmly embedded

over the centuries in English Law, which should be followed here. (*Archbold*, it will be noted, was an authority relied upon in Guernsey in the 19th Century; see the (second) Report of the Commissioners, published in 1848; and the principles set out in the present decision are meant to be in accordance with what is described in *Archbold* and now *Blackstone*).

The Condom

20. The question is set out precisely in D's skeleton, at paragraph 108:

> "… this is an Application to exclude evidence of the Condom found by the police by the outhouse at an area called "……." on the basis its probative value is outweighed by its prejudice to the Defendant."

In support of this submission reference is made to paragraph F2.36 of *Blackstone* and the well-known Privy Council case of Noor Mohammed v The King [1949] AC 182. The relevant quote is from Lord du Parcq delivering the opinion of the Board:

> "… but cases must occur in which it would be unjust to admit evidence of a character gravely prejudicial to the accused even though there may be some tenuous ground for holding it technically admissible."

So we are concerned with a common-law discretion to exclude. This is assessed on a case-by-case basis and is based on the simple principle that it is the duty of the judge to ensure that every accused person has a fair trial.

21. D suggests (paragraph 112) that the complainant has been led to the location by the Police and "had no idea where the outhouse was" and the address does not fit the description originally given. There is also no forensic link to D and many people in the relevant period were wont to have intercourse in various places with condoms worn. These items were, it is said, discarded "in fields, in sheds and all over the place". P's rejoinder (at paragraphs 101-106 of the skeleton) emphasises that the Police only searched one outbuilding, "Out of all of the outbuildings in the Island of Guernsey that might have been searched, this was the one that the complainant's evidence led them to". The complainant (in 2009) told the Police that nine years previously D had used a condom on that occasion "and throwing it in the shed". The complainant also, it is stated, "actually circled the location of the building on her own Digimap". ("AREA WHERE THE GREENHOUSE WAS (I THINK)"). The building in question was extremely overgrown, neglected and inaccessible. A purple "Durex" condom wrapper and a ring-shaped object were found. No other litter was located. Photographs are in the bundle produced by P at Tabs 17-18. The owner indicated he had left the building untouched for 15 years. The complainant's description of the alleged incident when a condom was used is in her third ABE interview page 9 (Tab 11 of P's bundle). Her account is that D had noticed the growth of her pubic hair and did not want her to get pregnant, even though she was then only 11.

22. There was a late witness statement from a gentleman who is a senior quality control manager for the current manufacturer of these items (Tab 19 of P's bundle). D submitted that all this is of little value and really adds nothing at all to P's case. What is put forward is, it was suggested, nowhere near the criminal standard of proof. P referred to the expiry date (which appears to be 2005) and submits it is "a remarkable discovery" and its probative value outweighs any prejudicial effect. Mr Dickson's statement deserves careful examination when considering the value of this unprepossessing article. The witness has viewed the images (see P's Tab 18) and looking at them for oneself is more vivid than a written exposition. The condom foil has Durex branding and there is also a reverse picture. The wording is consistent with a Durex product, but he cannot confirm whether the images are those of a genuine Durex

condom. "LOT" depicts the batch identification, and "EXP" the date of expiry. The actual item itself appears to be a degraded condom, but the witness is careful to state that because of the degradation he cannot say if it was a Durex product, and is unable to say if this condom was contained in the Durex foil shown.

23. It is necessary to have careful regard to the opinion of the Board in the Noor Mohammed case. Is it "desirable in the interest of justice that it should be admitted"? Is it to be excluded as of only "trifling weight"? Is it evidence that is "gravely prejudicial", even though there may be some "tenuous ground for holding it technically admissible"? It all boils down to what has already been mentioned in paragraph 20 above – every accused person must have a "fair trial". It is a matter for judicial discretion considering all the evidence, including in the present case the circumstances of the discovery. On carefully considering the submissions in this aspect of the application it does not appear to be a merely "tenuous" item of evidence. There is scope for argument to the Jurats on weight, as opposed to admissibility (in relation to the latter having taken the complainant's evidence and the other material referred to fully into account, including the circling of the outbuilding on the Digimap and her descriptions of the vicinity, and also including the use of a condom referred to in her early ABE interview). This, boiled down to basics, is just the sort of evidence that the Jurats should be entitled, after proper direction to consider. It is, of course, a long way off from being crucial or decisive to their deliberations, but is not merely "tenuous".

Conclusions

24. D's Advocate made full written and oral submissions with his customary skill and because of that and his enviable years of experience in all types of litigation, they are particularly deserving of respect, as well as close attention. But the principles, both in English and Guernsey legislation, and the numerous cases associated with the questions in this matter show an historical journey from the 1970's and 80's to the present day. Those who have experience of appearing in sexual cases at that time will see clearly how things have moved on. This has resulted, it is considered, in a more acceptable experience for complainants, but that does not entail a less fair trial for defendants. At the end of the day the burden of proof remains wholly on the Prosecution to the familiar standard. The usual exercise of looking at each case on the merits presented at the relevant time has to be undertaken. In the circumstances as presently available in the case, and having considered the applicable legal principles, the conclusions are:

    (i) the authorities have properly exercised their minds on the disclosure principles laid down in Taylor by Nutting JA, on the material put forward;
    (ii) proper enquiries in respect of the matters raised, especially in relation to the ……occurrence, have, it appears, been made;
    (iii) the application under Section 42 of the Law of 2013 is not approved. There is, as set out, no proper evidential basis and little, if any probative value;
    (iv) evidence as to the complainant's character is restricted in accordance with long-standing common-law principles;
    (v) the above conclusions aim to strike a fair balance between the rights of the complainant under Article 8 of the ECHR and those of D under Article 6. Hence a stay is not merited on the material before the Court; and
    (vi) the condom evidence is admissible and is not "tenuous" or unfairly prejudicial, whatever weight may be attached to it by the Jurats.

Accordingly the application dated 17th September, 2018, fails and is refused.

J R Finch, O.B.E.,
Judge of the Royal Court

APPENDIX: Dated Monday 1st July 2019

RE THE LAW OFFICERS OF THE CROWN v "D"

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

This is an Appendix to the decision handed down on 5th November, 2018, in relation to evidential and procedural matters in the forthcoming (1st July onwards) trial of D. Paragraph numbers follow on and it is helpful to refer to the earlier decision when considering the latest submissions which require resolution.

25. On 10th June, 2019, D's Advocate tactfully brought up various points arising from the earlier part of this decision. It was useful to deal with this in advance of the trial, and it was indicated to Counsel that if anything arose which caused a change in the earlier ruling that would, of course, be fairly examined. In a criminal case, many things are not set in stone, but minds can be changed if the reasons are valid. The objective is to secure a trial fair to both Prosecution and Defence.

26. The Defence proposes to call witnesses who will testify that they would not believe the complainant upon her oath. The situation is clearly governed by authority, see R v Richardson (supra) at paragraph 18 above. As stated there, the position is as set-out in *Archbold* (2019) 8-287 to 8-288. It was pointed out in the present hearing that the Prosecution then have the decision to make on how, if at all, to cross-examine on this point without unleashing the grounds for such a belief (and will be unable to contradict such evidence). This case depends on how the Jurats view the complainant, and if he gives evidence, D. Application of this well-established rule must be appropriate and it is regarded as binding upon the trial court. It is, of course, not for a judge at first instance to pronounce upon its utility, but apply it. (This is subject to what is set-out at paragraph 30 below.)

27. The condom evidence was dealt with at paragraphs 20-23 above. D's Advocate described it in argument as "*a ludicrous piece of evidence"*. It is not necessary to recapitulate the observations made in the earlier decision. A good deal may turn on how the circumstances of its discovery emerge in evidence, when they will be probed in skilled cross-examination. The point made at the earlier hearing about sites such as the one where this item was found are known to be used by people having sex was reiterated and can be made emphatically at the trial. If the evidence is weakened or discredited in relation to this aspect of the case, then an appropriate direction will be given. If it transpires that the prejudicial effect then outweighs the probative value, then the evidence will be excised from the Jurats' consideration and a direction will be given to that effect.

28. Paragraph 9 above refers to a letter allegedly sent to D by the complainant (Tab 6 of P's original bundle). This has been further discussed. The value of this letter is minimal and, of course, it does not amount to corroboration of the truth of its contents. It has been properly disclosed as unused material and, in all the circumstances, is best not referred to. This will remove a potentially distracting (and insignificant) piece of evidence from consideration. The ABE should be appropriately amended.

29. The common-law position (which applies in Guernsey, as the English legislation here has not been adopted) in relation to cross-examining a witness about their "mode of life" is set out in *Archbold* (2002) 8-138 (P's Tab 21 for the original hearing): "the witness can, in general, be compelled to answer questions which go to credit". But it goes on to say, "The judge has a discretion to excuse an answer when the truth of the matter stated would not in his opinion

affect the credibility of the witness as to the subject matter of his testimony" (See R v Scott (supra)). Even at common-law, any evidence relating to allegations, rather than convictions or cautions is, of very limited value. This is dealt with at paragraphs 16 and 17 above. Satellite litigation has to be controlled and the Jurats should not be distracted from trying the issue in the case. It should be noted that the complainant's alleged youthful bad behaviour does not relate to sexual activity with D. Many of the English cases relate to sexual offences, where the issue was consent. Here the issue is whether the offences alleged occurred at all, so celebrated decisions on questions going to credit and questions going to the issue, such as R v Funderburk [1990] 1 WLR 587 (CA) are not in point. What is in point is "the necessity in the interests of justice to avoid multiplicity of issues where possible" (R v Colwill [2002] EWCA Crim 1320). This type of questioning will therefore have to be assessed in the light of these decisions.

30. A point made at the first hearing by Advocate Calderwood is of real importance and should be carefully considered. The various allegations against the complainant relate to her, if a colloquial phrase may be used, being a "mixed-up" child. If an impeaching witness is called to give their individual opinion based on personal knowledge as to whether the impugned witness is to be believed, that personal knowledge has to relate to the impugned witness's present character. In R v N [2002] EWCA Crim 1595, one of the reasons why the father of a woman in her thirties could not testify as to her untruthful character was that his personal knowledge related solely to her dishonest behaviour as a child. This decision is likely to be relevant to the present case.

Judge J R Finch O.B.E.

1st July, 2019

Additional Cases and Materials referred to:

Archbold (2002), paragraphs 8-138
R v Colwill [2002] EWCA Crim 1320;
R v Funderburk [1990] 1 WLR 587 (CA);
R v N [2002] EWCA Crim 1595.