Application to admit evidence relating to the admission of facts (and pleas) at trial.

[2023]GRC078

IN THE ROYAL COURT OF GUERNSEY

Between:

THE LAW OFFICERS OF THE CROWN ("P") **Prosecution**

-and-

AARON JOHN CUSACK ("D") **Defendant**

Application to admit evidence

Application heard on: 23rd May, 2023

Decision handed down on: 13th June, 2023

Before: John Russell Finch, Esq, OBE, Lieutenant Bailiff

Counsel for the P: Crown Advocate C Dunford
Counsel for the D: Advocate A J Ayres

Materials referred to in Decision

The Loi relative aux Preuves au Criminel, 1923, Article 1;
The Police Powers and Criminal Evidence (Bailiwick of Guernsey) Law, 2003, Section 78

Law Officers v Doyle and Lanyon, 2015 GLR 280.
DPP v Mc Neill [2011] 1 ESC 12;
Myers v The Queen [2015] UKPC 40;
R v Bond [1906] 2 KB 389;
R v Campbell [2005] EWCA Crim 248;
R v Fulcher [1995] 2 Cr. App R 251;
R v M [2000] 1 All ER 148;
R v Pettman (1985) (Unreported);
R v Phillips [2003] 2 Cr. App R 528
R v R [2001] 1 WLR 1314 CA:
R v Rearden (1864) 176 ER 473 (4 F&F 76);
R v Sawoniuk [2000] 2 Cr. App R 220;
R v Sylvester [2005] EWCA Crim 1794;
R v W [2003] EWCA Crim 3024.

D Birch: Note [1995] Crim LR 651

Decision

Background

1. This is a further evidential ruling in this case. D, a serving officer in the Island Police Force, faces an Indictment comprising 4 Counts:

1	Perverting the cause of public justice.
2 – 4	Failing to disclose information under the Regulation of Investigatory Powers (Bailiwick of Guernsey) Law, 2003, as amended (the "RIPL offences").

D originally pleaded not guilty to all 4 counts. Following legal argument in respect of counts 2 – 4 on alleged abuse of process, which was determined in favour of P, the pleas on those counts were changed to guilty. A trial has been fixed in July in respect of Count 1, where the plea of not guilty remains. The matter at issue now, following legal argument on 23rd May, 2023, is the admission of the facts (and pleas) of Counts 2 – 4 at this trial. Put briefly, it is contended on behalf of D that (in the words of paragraph 3.1 of D's skeleton argument):

> *"there is no proper basis in law for admitting evidence either of the fact of the convictions for the RIPL offences, nor the facts underlying those admitted offences."*

and:

> *"the facts underlying the RIPL counts do not constitute relevant background information which could be admitted as an exception to the general rule."*

2. The gist of D's argument, also expanded at the hearing is set-out in paragraph 27 of D's skeleton:

> *".....The Prosecution do not seek to adduce background evidence properly so called, in other words evidence which helps to complete a complicated picture for the Jurats, or make it more comprehensible and coherent. The evidence underlying Counts 2 – 4 inclusive occurred subsequent to the facts alleged in relation to count 1. The nature of the background evidence the Prosecution seeks to admit is irrelevant to Count 1 in that it does not provide any context, nor does it clarify or explain or make more comprehensible the "actual" evidence in support of Count 1. The process of applying for a RIPL notice and the Defendant's refusal to provide passcodes is evidently material which would be helpful to the Prosecution to admit, but it is irrelevant and the probative value of the evidence (which is negligible) is far outweighed by its prejudicial effect."*

By way of a fall-back position D submits that if the conduct underlying Counts 2 – 4 is admitted, *"it is unnecessary for evidence of the facts of the conviction also to be admitted"*, as it adds nothing to the material facts in count 1 and would not assist the Jurats to understand the facts related to Count 1.

3. These submissions, which were rather late in coming, represented something of a hardening in D`s position. As P's reply of 23rd May, 2023 put it, D now sought to exclude all the RIPL evidence and not just the fact of the convictions. The Prosecution, creditably, responded to these further submissions on the day of the hearing. P's written Reply is that if this exclusion were made, the Jurats would have an incomplete picture at trial. "*At the heart*" of Count 1, P submits, is D's online relationship with the Complainant in the case. This was the "*obvious motive*" for the RIPL offences. In paragraph 8 of the Reply it is submitted:

> *"He took actions which effectively ended his Police career, and this is directly relevant to allowing an inference that there was evidence of contact between D and [the*

Complainant] he did not want the Police to see, which is then directly relevant to his conduct in Count 1, which was motivated by the same thing."

4. Before considering the merits of the parties' submissions it is helpful to consider the terms of Count 1. The description of the alleged offence of perverting the cause of justice reads as follows:

> *"….on or about the 19th October, 2021, with intent to pervert the course of public justice, did a series of acts, which had a tendency to pervert the cause of justice, in that he, whilst working as a police officer investigating a complaint of rape by [the Complainant], and with the intention of concealing the full details of his contact with her, used unlawful means to pressure [her] to withdraw her complaint of rape."*

Facts in outline

5. For the purposes of this decision P's case is taken and considered as set-out in the papers. The facts alleged can be summarised as follows:

(i) P states that D met the Complainant alone, without the presence of an appropriate adult, knowing she should have had one, and knowing her to be vulnerable, with a reading age of 12;

(ii) pressurising the Complainant to withdraw her complainant of rape against a third party and threatening her with prosecution if she persisted. The whole transaction was recorded on D's body-worn camera and this, and a transcript are available. D completed a statement of withdrawal on her behalf and arranged for a colleague to see her and have it signed. P suggests this was all done in order to conceal D's relationship in the past with the Complainant. D allegedly lied to her saying that the third party would be arrested;

(iii) later, when officers from the Professional Standards Department spoke to the Complainant, she revealed that she had previously been in an on-line relationship with D, starting on a dating app. Over several months they had regularly messaged one another on social media. Information from the Complainant's phone was limited, as it had been subject to a factory re-set. But a "My Data" extraction showed her and D linked on Snapchat between 31st July, 2019 and 10th July, 2020;

(iv) in relation to Counts 2 – 4 , 3 items, as described in the Counts, were seized from D's home. D eventually agreed to have the devices examined not locally, but by the Jersey Police, due to the existence of intimate photographs on them, showing himself and his current girlfriend. However, after this arrangement had been made D stated he needed legal advice before providing passcodes. He was served with an advisory notice on 27th October, 2021. On the 28th an affidavit was sworn before the Bailiff, supporting an application for D to disclose the passcodes. The Bailiff granted a notice under RIPL requiring disclosure, and this was served on D on the 29th. This required him to provide the passcodes within 7 days, which he failed to do.

(v) the devices were sent to Jersey anyway. Partial data only was extracted. In summary the following emerged from the partial picture that was available:

(i) admitted and hitherto undisclosed contact with the Complainant in August 2021;

(ii) alleged contact with the complainant in December 2018 and February 2019 (4 messages, which were "*hey", "hey", "how are yiu"* and *"?"*. The contents were made by "*Prev*", which D denies any knowledge of;

(iii) D disclosed to a member of Professional Standards in Summer 2019 that the Complainant had sent him a topless picture, which he deleted.

In interview D was shown a digital footprint on Snapchat between himself and the Complainant between 31st July, 2019 and 16th July, 2020 and made no comment (as he was entitled to do).

D admitted in interview that he had been in messaging contact with the Complainant and this looked bad, "*and it's not ideal*."

Applicable Legal Principles

6. In both Advocates' written and oral submissions there was a good deal of reference to my evidential ruling in the (long and complex) money-laundering case of Law Officers v Doyle and Lanyon, 2015 GLR 280. This was not appealed. Part of this judgment was devoted to background evidence (paragraphs 14-23), including looking at persuasive authorities in other jurisdictions – notably England and Ireland. Reference to these cases will be made here, as the principles have not been eroded since 2015. The basic position in England is shown in R v Pettman (1985) (unreported). In the words of Purchas LJ:

> *"Where it is necessary to place before the jury evidence of part of a continual background of history relevant to the offence charged in the indictment and without the totality of which the account placed before the jury would be incomplete or incomprehensible, then the fact that the whole account involves including evidence establishing the commission of an offence with which the accused is not charged is not of itself a ground for excluding the evidence."*

Thereafter, in R v W [2003] EWCA Crim 3024, events that took place over a number of years were narrated by the Complainant, the trial Judge considering that not to adduce background evidence would lead to a lack of understanding of the true relationship and real situation by the Jury. In R v Campbell [2005] EWCA Crim 248, background evidence was admitted to illuminate the defendant's relationship with teenage girls and to establish motive. The case of R v M [2000] 1 All ER 148 was notable for approving a note from Professor Birch in [1995] Crim L.R. 651. It was important, the note said, to distinguish evidence of background, which is normally admissible, from similar fact evidence. Professor Birch considered that:

> *"Background evidence, on the other hand has a far less dramatic but no less important claim to be received. It is admitted in order to put the jury in the general picture about the characters involved in the action, and the run-up to the alleged offence. It may or may not involve prior offences; if it does this is because the accounts would be as Purchas LJ says in R v Pettman "incomplete or incoherent" without them. It is not so much that it would be an affront to common sense to exclude the evidence, rather that it is helpful to have it and difficult for the jury to do their job if events are viewed in total isolation from their history."*

7. The Pettman observations did not emerge out of thin air. There were long-standing English decisions to largely the same effect. In R v Rearden (1864) 176 ER 473, Willes J admitted evidence of the accused sexual offending on subsequent occasions (emphasis supplied), stating that:

> *".....this seems to me to give a continuity to the transaction which makes such evidence properly admissible."*

In R v Bond [1906] 2 KB 389, Kennedy LJ admitted evidence, saying (at 400):

> *"Evidence is necessarily admissible as to acts which are so closely and inextricably mixed up with the history of the guilty act itself, as to form one part of one chain of relevant circumstances, and so could not be excluded in the presentment of the case before the jury without the evidence being thereby rendered unintelligible."*

The evidence was (at 401):

> *"….properly admitted to proof as integral parts of the history of the alleged crime for which the accused is on his trial."*

8. In R v Fulcher [1995} 2 Cr. App R 251, the Court of Appeal held that background evidence was not covered by the common-law "similar facts" rule of prima facie inadmissibility. Background evidence was admissible, so long as it could be shown to be relevant to an issue in the proceedings, subject to an exclusion under common-law principles or section 78 of PACE (PPACE in Guernsey – not engaged here). So, in R v Phillips [2003] 2 Cr. App R 528, the accused threats to kill his wife were admitted at his trial for murder, the Court of Appeal stated that background evidence is *"admissible unless in the interests of its discretion the court decides that fairness requires it to be excluded."* The decision in R v Sylvester [2005] EWCA Crim 1794 needs to be borne in mind; such evidence must be received carefully to avoid the prejudicial effect being more than the probative value, and to keep trials within reasonable bounds. Juries should not be distracted by extraneous, collateral or peripheral material. The Privy Council, in an appeal based on common-law principles – Myers v The Queen [2015] UKPC 40, also cautioned against too wide an application of "*The Pettman Proposition."* The evidence must truly add "*something beyond mere propensity*," which may assist the jury in resolving issues in the case. In Myers evidence of gangland practices was properly admitted as it "*significantly advanced the Crown case demonstrating motive*" rather than mere "*gratuitous evidence*." Accordingly, background evidence should be *"approached with particular care"* when the Prosecution seek to rely on it as part of their case (R v R [2001] 1 WLR 1314 CA, at 1319).

9. Upon careful examination of the authorities it is difficult to improve on the summary given by Denham J in the Irish Supreme Court case of DPP v Mc Neill 1 ESC 12, as set-out at paragraph 18 of the judgment of Doyle and Lanyon (supra). This reads:

> *"Background evidence may be admitted to give a jury a relevant picture of the parties in the time prior to the offences charged. Background evidence may be admitted because if it were not admitted it would create an unreal situation. It arises in situations where if no background evidence was admitted, the evidence before the jury would be incomplete or incomprehensible. Background evidence is evidence which is so closely and inextricably linked to the alleged offences and/or the relations between the relevant persons so as to form part of the body of evidence to render it coherent and comprehensible.*
>
> *Whether or not background evidence is to be admitted is a matter to be determined by the trial judge in all the circumstances of the case. The fact that the evidence tends to show the commission of other crimes does not render it inadmissible. The test to be applied is that of relevancy and necessity."*

In paragraph 19 the appropriate test propounded by Denham J was also set-out. It is very helpful, and considers the decision of Irish, English and Australian courts:

> *"In considering whether background evidence may be admitted, relevant considerations may include:-*
>
> *(i) Consideration of whether the background evidence is relevant to the offence charged.*

(ii) Consideration of whether background evidence is necessary to make the evidence before the jury complete, comprehensible, or coherent. Whether without such background evidence the evidence may be incomplete, incomprehensible or incoherent.
(iii) Consideration of evidence of the commission of an offence with which the accused is not charged, but that is not of itself ground for excluding the evidence.
(iv) Consideration of whether the background evidence may be necessary to show the real relationship between relevant persons.

The test to be applied by the court is whether the background evidence is relevant and necessary. The test is not that it would merely be helpful to the prosecution to admit the evidence."

In this part of the judgment Denham J concluded (paragraph 56):

"It is for a trial judge to decide whether or not to allow the admission of background evidence. In making that decision the trial judge has to determine as to whether such evidence is relevant and necessary to a fact upon which a jury is required to determine. For example, it may relate to the relationship of the complainant and accused at the time of the commission of the crimes as charged on the indictment. It may be relevant and necessary to explain the action or inaction of a complainant in the circumstances."

The Present Case

10. The "*background evidence*" relating to the RIPL Counts (2 – 4) is relied upon by P to show motive. Events cannot be "*viewed in total isolation from their history*" (see paragraph 6 above). It is also an "*integral part of the history of the alleged crime for which the accused is on his trial*" (see paragraph 7 above). Motive was the main reason for allowing such evidence in the Privy Council case of Myers (see paragraph 8 above). P's case is that D sought to conceal items on his various devices that would amply demonstrate his previous relationship with the complainant. To quote Denham J once more " *Background evidence may be admitted because if it were not admitted it would create an unreal situation*" (see paragraph 9 above). As Advocate Dunford put it in paragraph 6 of the Reply, D's withholding of his passcodes was "*a deliberate act intending to stop access to evidence.*" It might even be postulated that these actions would be successful if the full picture is not available at trial. The Jurats could well ask themselves "why did he do this?" when assessing Count 1. P is correct in submitting that they would be left with "*very incomplete and misleading picture of the Police investigation*" (paragraph 4 of P's Reply). Acceding to D's submissions would leave an artificially truncated view of the case. The relationship between D and the Complainant is the heart of the case. In considering this it is clear that there will not be any satellite proceedings thrust into the trial, nor is the reason for using the RIPL evidence simply a matter of making the life of the Prosecution easier. The relationship is the important thread that runs through the middle of the case. The fact D has now admitted his guilt is an integral part of the picture. If the pleas are not referred to, the situation for the Jurats would be almost as confusing as if the evidence of the whole situation was not admitted. As Denham J stated, the fact that the admission of other crimes goes in does not render the evidence inadmissible – the test is relevancy and necessity. What will be needed, as a number of the cases make clear, is a direction to the Jurats on "*inferences*" and that the evidence "*does not of itself go to propensity*" (paragraph 9 of P's Reply). It is hoped this can be thrashed out with Counsel at the appropriate point at trial.

11. For the sake of completeness, the Loi relative aux Preuves au Criminel, 1923, Articles 1 (f) and (g) referred to by D in his skeleton are not inconsistent with the common-law principles regarding background evidence. There is a discretion to admit evidence to prove D's motive (or intention). Also, the fact that D's offending took place after the date of Count 1 does not affect the position; see R v Rearden in paragraph 7 above. Even without this old authority the

facts relating to all the Counts are, it is considered, inextricably bound up. As P put their case there is plainly a "*common thread*" (as mentioned in paragraph 27 of Doyle and Lanyon).

12. A clear and graphic example of the application of the legal principles involved is provided by the war-crimes case of R v Sawoniuk [2000] 2 Cr. App 220. There was direct evidence of D committing murders of local Jews from eye-witnesses. The trial judge allowed the Prosecution to call further evidence which gave accounts of D's extraneous misconduct, showing D had been actively involved in "*search and kill*" operations, e.g. D leading a Jewish family to the site of a massacre, who were never see again. The Court of Appeal considered that such evidence was relevant in showing D's involvement in "*search and kill*" operations and that he was a member of the group of auxiliary policemen to which the murderer belonged. The evidence was not adduced in order for the jury to reason from disposition to guilt, so it was not covered by the "*similar facts*" rule of prima facie in inadmissibility. Pettman was applied, and it was held that the evidence in any event properly admitted on the "*broader basis*" that criminal charges cannot be fairly judged in a factual vacuum. The Court of Appeal therefore decided:

> *"…in order to make a rational assessment of evidence directly relating to the charge, it may often be necessary for a jury to receive evidence describing, perhaps in some detail, the context and circumstances in which the offences have said to have been committed."*

The evidence was deemed "probative and admissible" because the events had to be set in their factual context.

13. On the particular facts alleged in the present case, the RIPL evidence is highly probative and outweighs the prejudicial effects. It will allow the Jurats to look at the whole set of circumstances P suggests led up to and caused the events covered in Count 1. This is not collateral or peripheral material, and will assist in a rational examination of the facts. The evidence therefore is admissible and can be relied upon by the Prosecution.

14. Application to admit evidence granted.

J R Finch, O.B.E.
Lieutenant Bailiff

13th June, 2023