

**Judgment 4/2011**

**Law Officers of the Crown v Anthony John Jones**  
**- Royal Court (Criminal File 8 of 2010)**  
**- 2<sup>nd</sup> February 2011**

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**Criminal trial – offences of attempted murder or, in the alternative, wounding with intent – application to exclude proposed prosecution evidence – relevance, discretion at common law to exclude relevant evidence and s.78 of the Police Powers and Criminal Evidence (Bailiwick of Guernsey) Law, 2003**

**IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY**

The 2<sup>nd</sup> day of February, 2011 before John Russell Finch, Esquire, Judge of the Royal Court, sitting alone.

In the action of THE LAW OFFICERS OF THE CROWN against ANTHONY JOHN JONES and in the matter of an application by the Defence to exclude evidence;

WHEREAS on the 19<sup>th</sup> day of January, 2011 the Court, consisting of the Judge of the Royal Court sitting alone, heard Advocate C. Dunford for the Crown and Advocate R. Eeles for the accused and adjourned the matter for a Decision to be handed down in due course;

THE COURT this day handed down the said Decision in the terms attached hereto.

S M SIMMONDS  
Her Majesty's Deputy Greffier

**IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY**

**Between:**

**LAW OFFICERS OF THE CROWN**

**-v-**

**ANTHONY JOHN JONES**

**Decision on Admissibility**

**Case heard on: 19<sup>th</sup> January 2011**

**Decision handed down on: 2<sup>nd</sup> February 2011**

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

**Advocate R B Eeles for the Defendant**

**Crown Advocate C G Dunford for the Law Officers**

**Statute and Cases referred to:**

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

DPP v Kilbourne [1973] AC729

R v Jelen and Katz (1990) 90 Cr. App. R.456

R v Keenan [1990] 2 QB 54

R v Sang [1980] AC 402

R v Sawoniuk (2000) 2 Cr. App. R. 220

R v Tomkins (1977) 67 Cr. App. R. 181

R v Younis and Ahmed [1991] Crim L.R. 425

**Introduction**

1. The defendant (“D”) is charged with attempted murder and, in the alternative, wounding with intent. He has pleaded not guilty to both counts and the trial is due to take place later this month. On 19<sup>th</sup> January 2011 I heard an application to exclude two items of proposed Prosecution evidence and indicated that I would hand down a judgment as soon as practicable, which I now do. Both Advocates had provided me with skeleton arguments setting out their positions clearly, and augmented these with oral submissions at the hearing. The quality of all these contentions was high and neither counsel wasted Court time for which I am grateful.
2. The factual setting of the case is well set out in D’s main skeleton argument at paras 3 – 10 and in the supplemental argument at paras 2 – 4. The two topics can be referred to conveniently as the “*drive*” and the “*statement*” respectively. In relation to the former, the

evidence in issue is that of DS Zierlinger (pages 31 to 33 of the committal folio); and PC Wright (pages 34 to 37). In relation to the latter, the evidence is exhibit SJC/177/2A (“*Jones Statement.com*”) annexed to the second witness statement of DC Cummins at Tab 1 of Advocate Eeles’ supplemental bundle. Put briefly the “*drive*” was conducted after D was charged with wounding with intent and it is stated D had agreed to assist the Police to locate the knife used in the incident. Accordingly, three police officers, D and D’s then Advocate drove round various parts of the north of the Island in an unsuccessful attempt to locate this weapon. The “*statement*” was completed by D in November 2009, after he had been charged with criminal damage and assault in respect of the female whose actions allegedly provide a motive for D’s behaviour leading up to the present case. The document was provided for use in England by D’s English solicitor. The case was subsequently withdrawn by the C.P.S. This sets out in detail D’s relationship and history with this person. The Prosecution wish to use these matters in the forthcoming trial, and the Defence want them excluded.

### Applicable Legal Principles

3. The Law is not in dispute between the parties, it is how it is to be applied to the individual circumstances of this case. The principal headings under which submissions were made were:
  - (i) relevance; and
  - (ii) common Law discretion to exclude evidence; and
  - (iii) Section 78, PPACE.

The main arguments will, it is hoped, be clear from the observations that follow in this judgment. I shall deal with the drive first, then the statement.

4. Before doing so, I will attempt to set out concisely how it seems to me I should approach the relevant law in this application:
  1. Relevance

A definition is difficult, as individual circumstances are so important. In summary, in a criminal case, evidence is relevant if the effect of it is to make more or less probable the existence of any fact which is in issue, upon which guilt or innocence depends.
  2. Common Law discretion

This is summarized in the familiar case of D.P.P. v Sang [1980] AC 402. The court’s discretion at common law to exclude relevant evidence takes two forms: exclusion of evidence if its likely effect is prejudicial, outweighing its probative value; and to a limited extent, to exclude improperly or unfairly obtained evidence.
  3. Section 78 of PPACE

This statutory concept requires the Court to take all the circumstances into account, including the circumstances in which the evidence was obtained and answer the question of whether the admission of the evidence will have such an effect on the fairness of the proceedings that the Court should not admit it. Note the words of Auld J in R v Jelen and Katz (1990) 90 Cr. App. R 456 and 465: “*The circumstances of each case are almost always different, and judges may well take different views in the exercise of their discretion even where the circumstances are similar. This is not an apt field for hard case law and well-*

*founded distinctions between cases*”. For the sake of completeness, I consider the requirements of Article 6 of ECHR are met by the proper application of Section 78.

### **The Drive**

5. In his interviews, D indicated a willingness to help find the knife (see pages 52 and 118), in the words of DS Zierlinger: “*Jones had agreed to assist us with locating the knife that it is alleged was used during the alleged attack .....*”. During the trip he was asked if he could remember where he had deposited the knife. The directions came of D’s own volition. It would be stretching this to designate what took place as an “*interview*” concerned with D’s “*suspected involvement in a criminal offence*”. If enough can be drained out of this event to make it an “*interview*” then the Prosecution are correct to say that conducting it at the Police Station would lead to a delay likely to occasion “*interference with or harm to evidence connected with the offence*” as mentioned in Code of Practice C. A further consideration here is that no devastating admission was made by D and lots of extra questions were not put in the car by the Police. See R v Younes and Ahmed [1991] Crim. LR 425, where the circumstances were similar and it was found no “*interview*” took place.
6. If I am technically incorrect and this episode is capable of being deemed an “*interview*”, I have to apply my mind to possible exclusion. There was no trick by the Police and there is nothing to show that this material is overly prejudicial to D, accordingly recourse must be had to Section 78 of PPACE. The Police did not behave in an oppressive or improper manner, there was no bad faith. This, on the particular facts of this case, weighs as a significant factor. The case of R v Keenan (1990) 90 Cr. App. R 1 dealt with significant and serious breaches of the code and is not applicable here. Any breach here is a mere technical breach and should not lead to exclusion. Accordingly, the Prosecution may make use of this evidence in the way they have proposed. Whether it is especially probative to put to D, should he give evidence, that this was a ruse designed to bolster a false defence is for the Jurats to consider.

### **The Statement**

7. It is accepted by both sides that when prepared for the purposes of D’s defence in England, this document attracted legal professional privilege (LPP). It is conceded by the defence that the Prosecution can make use of the statement (see R v Tompkins (1977) 67 Cr. App. R. 181).
8. Privilege in this context only relates to the production of a document, it does not determine its admissibility in evidence. There is no question on the facts of any impropriety or deception by the Police in obtaining access to the statement from D’s own laptop.
9. Like the defence, I have a problem on the relevance of this document. A careful reading shows that D has shown tolerance towards the lady’s allegedly promiscuous behaviour and makes no reference towards the complainant in the present case. There seems to be little to D’s discredit in this statement which is hardly surprising when considering the circumstances under which it was produced. At the very highest it is of limited probative value. To suggest that D had reached the end of his tether before allegedly committing the present offence is an inferential leap too far. But even if the document does have some probative value, it clearly shows that D was facing a charge of assault in relation to Miss Ellis in mid-2009. The collective experience of the Jurats will soon lead them to ascertain what this statement is. Even a clear direction that D was acquitted when the case did not proceed cannot remove this taint. There has to be a line drawn and, as pointed out in oral argument, the Prosecution have the text messages at page 152 of the bundle showing rawness of emotion far nearer the relevant time. These considerations apply both to the common law test for exclusion and

Section 78 of PPACE. When looking at Section 78, I cannot dismiss from my mind that this was originally a document covered by LPP, and although technically it can be admitted, that is still a relevant consideration when looking at the overall fairness of allowing its use. I accept that charges cannot be fairly judged in a factual background, but this case is very different from the compelling set of facts in R v Sawoniuk (2000) 2 Cr. App. R 220. Overall, the probative force (in a self-serving statement) is weak and the prejudicial possibilities real.

### **Conclusion**

10. Accordingly the evidence of the ride is, in my judgment, admissible, but D's statement is not.