Law Officers of the Crown v Paulo Alexandre Correia
Royal Court
17th August, 2105

JUDGMENT 40/2015

Decision on Admissibility of Evidence.

Approved Text
17.08.2015

IN THE ROYAL COURT OF GUERNSEY

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

-v-

PAULO ALEXANDRE CORREIA **Defendant**

Decision on Admissibility of Evidence

Application heard on: 31st July, 2015
Decision handed down on: 17th August, 2015

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

Counsel for the Prosecution: Crown Advocate C G Dunford
Counsel for the Defendant: Advocate P F Cobb

Materials referred to in decision:

The Police Powers and Criminal Evidence (Bailiwick of Guernsey) Law, 2003, Sections 76 and 78;
The Police and Criminal Evidence Act, 1984, Sections 76 and 78;
The Live-link Evidence (Bailiwick of Guernsey) Ordinance, 2008, Section 1(2)(c);
The European Convention on Human Rights, Article 6
Archbold (2015 edition), paragraphs 15-319, 15-322;
Zander on PACE (16th edition) paragraph 8-46.
Pinto v Law Officers 2013 GLR 83;
Tilley v Law Officers (Court of Appeal, 27.11.73);
R v Barry (1995) 95 Cr. App. R. 384;

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R v Dunford (1990) 91 Cr. App. R. 150;
R v Goldenberg (1988) 88 Cr. App. R. 285;
R v Loosley, Attorney-General's Reference (No. 3 of 2000) [2001] 1 WLR 2061;
R v Pettman (1985) (unreported);
R v Phillips [2003] 2 Cr. App. R 528;
R v Sawoniuk [2000] 2 Cr. App. R. 220;
R v Walsh (1990) 91 Cr. App. R. 161

DECISION

Introduction

1. The defendant ("D") faces an Indictment comprising one count of rape. He has pleaded not guilty, but before the trial commences seeks to have certain evidence excluded. The principal category with which the hearing is concerned is the admissibility of various parts of his Police interviews. The next refers to miscellaneous issues, namely three sets of messages sent by D to another woman ("M"), his mother and Daniel Taylor at the relevant time, as well as evidence from M and the complainant, as to his alleged "lustful" behaviour prior to the alleged offence. Finally, there is a question on the use of a live video-link to receive the complainant's evidence. Skeleton arguments from D and the Prosecution ("P") have been considered, as well as oral submissions. In view of the shortness of the time-gap between the date of the legal arguments and the commencement of the trial proper it was agreed the decision should be given in advance, with the reasons to follow, which these are.

Background

2. It is alleged that D raped the complainant on 3rd January, 2015. Shortly after arrest he was interviewed and P submits he made significant admissions in the course of these. He is a native of Madeira and therefore an interpreter was present throughout. As explained at paragraph 4 of P's skeleton on the interviews the tapes were sent off-Island for an independent interpreter to prepare full transcripts. These are agreed as accurate for the purposes of the case. It is helpful when considering the two transcripts to follow the key to the wording helpfully provided on the first page of each.

3. P also seeks to adduce evidence to the effect that he is, to repeat the word employed "lustful". This refers to his behaviours shortly before the alleged offence in relation to M and previous conduct with the complainant. M also refers to messages sent between D and her in the early hours of the morning of 2nd/3rd January 2015, prior to the incident the subject of the charge. In addition, there is a short message sent by D to his mother in Madeira and a brief interchange between Mr Daniel Taylor and D. The video-link point is separate and will be dealt with at the end of this decision, as it raises different issues. It is now necessary to consider each part of these matters in detail.

The Interviews and Messages

4. In D's skeleton relating to the interviews, the main suggested "prejudicial" comments made by him are set out at paragraph 22:

> "(a) '*I'm guilty. What I did'* [Transcript 1, page 2]
> (b) '*I know that I'm guilty'* [Transcript 1, page 2]
> (c) '*I know what I did. I know that it's true*' [Transcript 1, page 2]
> (d) '*But if she says that it was rape, its true'* [Transcript 1, page 4]
> (e) '*If she says it was rape, it was'* [Transcript 1, page 4]
> (f) '*I can't say that she wanted it'* [Transcript 2, page 6]
> (g) So you don't know if she wanted to have sex? *'Yes. I don't know'* [Transcript 2, page 6]

(h) '*No I didn't say that I thought that she wanted sex* (inaudible). *I didn't think that*.' [Transcript 2, page 6]
(i) '*It's not the first time I've been drinking and I do something like that*' [Transcript 2, page 16]
(j) Is it possible that she didn't want sex? That she didn't give permission? '*Probably*' [Transcript 2, page 20]
(k) Do you think it is possible that what she is saying and what Jamie is saying is really what happened, since you don't remember? '*Yes*' [Transcript 2, page 26]
(l) So it is possible that alcohol has maybe clouded your memory and what you remember may also be distorted? '*Yeah*' [Transcript 2, page 26]"

5. Three sets of messages need to be considered:

(i) Messages sent between Mr Correia and M on the evening and early hours of the 2nd and 3rd of January 2015.

DATE/TIME	**FROM**	**TO**	**TEXT**
3.1.15 @ 2:40:20 am	P Correia	M	*Can I go*
3.1.15 @ 2:40:32 am	M	P Correia	*Go where*
3.1.15 @ 2:40:34 am	P Correia	M	*Tu:*
3.1.15 @ 2:40:54 am	P Correia	M	TO yours
3.1.15 @ 2:41:02 am	M	P Correia	*No*
3.1.15 @ 2:41:10 am	P Correia	M	*Why?*
3.1.15 @ 2:41:18 am	M	P Correia	*Because I said no*
3.1.15 @ 2.41:52 am	P Correia	M	*I will kiss you every where*
3.1.15 @ 2:42:17 am	M	P Correia	*When I say no it means no !*
3.1.15 @ 2:43:14 am	P Correia	M	*OK sorry I really want*
3.1.15 @ 2:43:21 am	M	P Correia	*And*
3.1.15 @ 2:43:40 am	P Correia	M	*You are the best*
3.1.15 @ 2:43:54 am	M	P Correia	*Go home*
3.1.15 @ 2:44:14 am	P Correia	M	*I'm going now*
3.1.15 @ 2:44:24 am	P Correia	M	*On my way*
3.1.15 @ 2:46:23 am	P Correia	M	*Tu:*
3.1.15	P Correia	M	*Where are you ?*

@3:17:51 am			
3.1.15 @ 3:18:32 am	P Correia	M	*?????*
3.1.15 @ 3:19:16 am	P Correia	M	*U ok ?*

(ii) A Facebook message sent from Mr Correia to his mother on the morning of the 3rd of January in Portuguese:

DATE/TIME	**FROM**	**TO**	**TEXT**
3.1.15 @ 11:09 am	P Correia	Tania Correia	*Ja não vou a madeira vou ir preso mas vai ser bom para eu aprender desculpa não te preocupes não matei ninguém* AGREED TRANSLATION: "I am not going to Madeira now I will be arrested but it will be good for me to learn, don't worry I have not killed anyone"

(iii) A Facebook message sent by Mr Correia to Daniel Taylor on the morning of the 3rd January 2015.

DATE/TIME	**FROM**	**TO**	**TEXT**
3.1.15 @ 10:58:14 am	D Taylor	P Correia	*Dude are you in the building if not they just phobex the fucking police about that gir* *I you apparently raped last night*
3.1.15 @ 11:13:04 am	P Correia	D Taylor	*its ok Bro I see in a few years ;)*

Other Evidence

6. M refers to D being "*touchy-feely*" and expands on this later in her statement saying D "*was being touchy towards me and saying lewd things, like he wanted to have sex with me – he wanted to touch me and that he liked me …*". The complainant states that D is "*always weird, every time he sees me he says he loves me"* etc. The passages are set out at paragraph 2 of P's skeleton argument on miscellaneous issues.

Legal Submissions

7. D firstly cites Section 76 of the Police Powers and Criminal Evidence (Bailiwick of Guernsey) Law, 2003 ("PPACE"), which is in similar terms to Section 76 of the Police and Criminal Evidence Act, 1984 ("PACE"). The alternative submission is under Section 78 of PPACE, which bears the same relationship to Section 78 of PACE. Finally, the common law position is relied upon. In paragraph 26 of her skeleton Advocate Cobb states that "*given the context of the circumstances surrounding the interview and the comments made by Mr Correia and how they were obtained they should be deemed unreliable under Section 76 and*

therefore deemed inadmissible". Section 78 comes into play, it is suggested, due to the "*cumulative effect of all the shortfalls in the interview"*. Finally, the prejudice caused by admitting the interview would significantly outweigh its probative value.

8. In relation to the Section 76 point, it is submitted that D received no legal advice, from which he, as a foreign national, facing a serious charge would have benefited. At no point was the offence of rape fully or properly explained, and D was allowed to answer in English for a significant part of the interview. "*It was not fair that he was allowed to continue speaking in English about such a serious matter"* (paragraph 1.3 of skeleton). Furthermore, there was confusion in the interview, especially in relation to "consent". The Section 78 point is also covered by the circumstances due to the cumulative prejudicial effect and the "minimal weight" that can be placed on his answers. The common-law situation is, as is often the case, tacked on to the Section 78 point. There is also a passing reference to Article 6 of ECHR (paragraph 3 of D's skeleton).

9. P submits Section 76 is not engaged in this case. Plainly the first limb ("oppression") does not apply; accordingly we are concerned with "*... anything said or done which was likely, in the circumstances existing at the time to render unreliable any confession which might be made by him in consequence thereof"*. The onus is on P to prove the confession was not obtained in that way. In R v Goldenberg (1988) 88 Cr. App. R. 285 the English Court of Appeal took the view that there had to be a causal link between what was said and done and the resulting confession, particularly as the relevant part of the section uses the words "in consequence*"*. No factual basis has been established to justify this ground here.

10. P states that there was no breach of Codes of Practice, as D was plainly and clearly offered an Advocate and the elements of the offence were adequately covered, especially in relation to consent (e.g. page 32, first interview and page 6 onwards of the second interview). The definition given by the officer was incomplete and simplified. D had already said (at page 30 of the first interview) that he understood rape to mean - "*That I forced someone to have sex"*. P suggests, in accordance with the discussion in Archbold 15-322 that "unreliable" means "cannot be relied upon as being the truth". The question of reliability is always fact specific and, in particular, defendant specific. P dealt with paragraphs 14-16 of D's skeleton on the use of English by submitting that in the words of Archbold at 15-319, "The words 'said or done' in Section 76(2) do not include anything said or done by the person making the confession". It is limited to something external (R v Goldenberg (supra)).

11. P submits that on listening to the tapes it is evident that on many occasions D answered so quickly in English that diverting him was impossible. Furthermore the interviewing officers acted reasonably to remind him to answer in Portuguese. In particular he was warned to speak in Portuguese at page 5 of the first interview and to "*always speak in Portuguese*" at page 35 thereof. The interpreter also contributed to this in the first interview, at pages 2 and 4, saying he should explain or tell it in Portuguese.

12. P considers the correct provision to use is Section 78. The question of whether D was in fact genuinely confused in interview can, it is said, be dealt with by the normal trial process. The same applies to any problem about the word "consent", which the interviewing officers dealt with fairly. As a general observation it is submitted the majority of prosecution evidence is prejudicial and (paragraph 19) the test is whether "undue prejudice" is occasioned. The interview is highly relevant to establish all the elements of the offence starting with sexual intercourse. There is no fault here by the Police and it would be unfair to exercise the discretion vested on the Court in favour of exclusion. The same considerations apply to the common-law test, and the interview comments are so probative as to outweigh any prejudicial effect.

13. Turning to the messages referred to at paragraph 5 above, D argues that the exchange with M goes to propensity and the prejudicial effect far outweighs any probative value. In fact there is an "enormous amount of prejudice and risk" that the Jurats may focus solely on these messages as a way to determine D's state of mind on the night in question. It is also unfair to

admit his message to his mother in Madeira. There is little probative value and various interpretations can be afforded to it. The message to Mr Taylor also poses a "huge risk that the Jurats may wrongly assume" some sort of acceptance of guilt. Neither that message, nor the one to his mother were put in interview. They have little probative value. Similarly, the remarks made by M and the complainant about D's allegedly libidinous conduct go to propensity and the prejudicial effect is likely to far outweigh any limited probative value.

14. In response, P cites the English case of R v Sawoniuk [2000] 2 Cr. App. R. 220, applying the well-known case of R v Pettman (1985) (unreported). Criminal cases cannot, in effect, be tried in a vacuum and it may be necessary to assist a jury by receiving evidence "describing perhaps in some detail, the context and circumstances in which the offences are said to have been committed". The evidence here is attributable to only a short period of time before the alleged offence and, indeed, relying on propensity is not a bar to receiving the evidence. The complainant's account shows D has been sufficiently sexually attracted to her as to seek some sort of physical relationship, and is plainly relevant and a matter he denied during interview.

Applicable Legal Principles

15. Section 76 does not seem an appropriate vehicle in the circumstances of this case. A useful guide to the test to apply is found in the English case of R v Barry (1991) 95 Cr. App. R. 384: (1) was there "anything said or done"? (ii) if so, was this likely in the circumstances to render "any confession" unreliable, which may have been made as a consequence? (iii) if so, did the thing said or done actually cause D to make his particular confession? R v Goldenberg (supra), it must be emphasized, makes the point that "anything said or done" was limited to extraneous matters and did not apply to anything emanating from the accused himself.

16. Applying this guidance, it is very difficult to see how anything that took place in the interviews falls foul of Section 76. The way legal advice was dealt with by the interviewing officers was careful and cannot be criticized. Page 2 of the first interview shows how D's right to an "independent" Advocate that would be "free and independent" was spelt out. He had been asked if there was any reason he did not want a lawyer and responded (in English) "*I'm guilty"*. At the start of the second interview this was again set out, not in a perfunctory or rushed manner. It was stressed that this was a continuing right. An accused person cannot be forced to have legal representation. Similarly, the essential elements of the offence were explained. At page 30 of the first interview he is asked if he understands what rape means, and responds – "*That I forced someone to have sex"*. The definition given by Officer 2 is the old one, familiar to the more senescent lawyer as "force, fear or fraud", which is adequate. The translation however renders it as "that person was afraid, or you are forcing that person, or whatever". This seems, with respect, an adequate working definition, without needing to descend into the realms of statutory interpretation.

17. D's skeleton argument makes much of the language issues. It is helpful to listen to the record of interview, which is a lot clearer than mere print. The language switches came from D himself, nothing was "said or done" by the officers. They also, as did the interpreter, try to get him to speak in his native tongue e.g. at page 34 of the first interview, "*always speak in Portuguese"*. The interpreter pressed this point early on, at pages 2 and 4. It is helpful to listen to D's use of English on the record. Accordingly, D fails in the Section 76 point, which was not appropriate in the circumstances.

18. In relation to Section 78 there is a helpful general observation based on the cases by Professor Zander in the leading text "Zander on PACE" (6th Edition) at paragraph 8-46:

> "In summary, the court generally will uphold the defence position under section 78 only where it is persuaded: (a) that there was a breach of the rules or other impropriety; (b) that it was significant and substantial; (c) that it affects the proceedings unfairly from the defence standpoint; and (d) that the unfairness is so great as to require that the evidence be excluded.

In R v Walsh (1990) 91 Cr. App. R. 161, which Professor Zander refers to, the English Court of Appeal said, at 163:

> "The task of the court is not merely to consider whether there would be an adverse effect on the fairness of the proceedings, but such an adverse effect that justice requires the evidence to be excluded."

In the absence of bad faith on the part of the Police an application under Section 78(1) to exclude a confession is unlikely to succeed, see R v Dunford (1990) 91 Cr. App. R. 150.

19. Thus, in the absence of any bad faith by the Police or breach of the codes, it does not seem appropriate to exercise the discretion in favour of exclusion in respect of the potentially significant interview evidence. There are suggestions of confusion by D and the question of consent was raised, but these are essentially matters of weight to be decided on the totality of the evidence which emerges and with appropriate directions. Again, it assists to listen to the records. D can, if he wishes, exercise his right to give evidence, and his Advocate can of course make submissions when the evidence emerges. Matters of weight should not be confused with questions of admissibility. P's skeleton (paragraph 19) here is correct in saying that the majority of prosecution evidence is prejudicial, but it is undue prejudice that must be avoided. There must be fairness to all sides in the process, including the alleged victim – see, e.g. the speech of Lord Steyn in R v Loosley, Attorney-General's Reference (No. 3 of 2000) [2001] 1 WLR 2061. The interviews do not fall foul of the safeguards set up by Section 78. The role of the Police deserves credit for fairness on what is heard. The common-law position in matters of this type is subject to the same general principles and there is no practical difference in considering it than from seeking to apply Section 78, they are closely-related and the result is the same.

20. The next question relates to other items of evidence, the subject of separate skeleton arguments. The nature of the material in question has been described at paragraphs 5 and 6 above and comprises messages from D to various persons and his conduct to females shortly before the alleged offence. The latter evidence is suggested as relevant and admissible by P as it shows "*an overly tactile and persistent approach towards women …*". These activities do not cover years, months or even hours, but a short time-frame before the incident the subject of the charge. P puts the case (see paragraph 16 of the skeleton) on the basis D began to have intercourse with the complainant without any preliminaries and took advantage; it is alleged, of a vulnerable and unconscious woman. He made sexual advances towards another woman within an hour of this taking place. At paragraph 11 of the skeleton P states:

> *"The evidence is being led to suggest a propensity to commit the offence charged – in essence the Prosecution are asking the court as a matter of logic and common sense to consider that because the D has made advances towards M, in close proximity to the alleged offence upon C, it is more likely he did commit the offence in the way alleged by the prosecution, i.e., he could not control his sexual urges and at the least could not have cared less whether C was conscious or not but proceeded to have sexual intercourse with her. Relying on propensity is not a bar to admissibility."*

21. P also refers to the previous incident with the complainant. This is put forward in order to show his attraction to her sufficiently to seek a physical relationship and which was denied in interview. Generally it has to be noted that the reception of this sort of evidence has to be justified having regard to the fact that its prejudicial effect might outweigh its probative value and the need to keep trials within reasonable bounds, so that the Jurats are not distracted by collateral material. If the evidence is admitted then it must be consistent with R v Sawoniuk (supra) applying the Pettman principle, i.e., criminal charges cannot be judged fairly in a factual vacuum and "in order to make a rational assessment of evidence directly relating to a 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 are said to have been committed". Put rather simply in R v Phillips [2003] 2 Cr. App. R. 528 relevant background evidence "is

admissible unless, in the exercise of its discretion the Court decides that fairness requires it to be excluded" (which also covers any enquiry under Section 78 of PPACE). Looking at the circumstances, hopefully fairly, and noting the nature of the allegation and the proximity in time of these incidents to the alleged rape, together with the suggested mental attitude and motivation of D, these items of evidence are potentially highly probative and any prejudice is outweighed. This view will be re-visited if the oral evidence is presented substantially differently from that depicted in the witness statements.

22. Similar considerations apply to the messages. Their reception would adversely affect the fairness of the proceedings D submits under Section 78 and they are of minimal weight and of "little probative value". As with the alleged incidents referred to at paragraphs 20-22 above, the PPACE and common-law considerations are, in practical terms, the same. In relation to the message exchange with M, D's argument (paragraph 10 of the skeleton) is that there is an "*enormous amount of prejudice and risk to Mr Correia in that the Jurats may focus solely on those messages as a way to determine his mind set on the night in question*". This, with respect, shows a lack of faith in the Jurats, assuming that they receive an appropriate direction. The messages to M fall into the same category as his physical conduct set out in paragraph 6 above and should be admitted under the same principles described in paragraphs 21 and 22 above. The messages came from D and are in his own words, also demonstrating his state of mind and motivation at that particular time.

23. The message to Taylor states D would see him "*in a few years*". As D's skeleton argument puts it (at paragraph 15):

> *"It would be unfair to include this message as evidence. There is a huge risk that the Jurats may wrongly assume that when he said that he would be seeing Mr Taylor in a few years that he was accepting that he would be spending time in prison or that it was any kind of acceptance of guilt."*

P points out (paragraph 14 of skeleton) that this is a clearly permissible inference from the evidence and is borne out by D's alleged acknowledgement of guilt in the interviews. In the immediate aftermath it is alleged that D knew he had done wrong and admitted it. Again, and also with respect, D's argument shows some absence of faith in the Jurats, whose position was correctly set out in P's main skeleton at paragraph 21. ("The Jurats are holders of judicial office and are far more experienced in the affairs of law and legal procedure than the normal juryman in the United Kingdom"; per Le Quesne JA in Tilley v Law Officers (27.11.73).) Looking at the exchange the construction put on D's words by P is logical and, in all the surrounding circumstances, permissible. It is consistent with an admission of culpability shortly after the alleged rape.

24. The message to D's mother is in rather less clear terms. The material part reads *"... now I will be arrested but it will be good for me to learn, don't worry I have not killed anyone*". The vagueness of this phrase is such that the probative value is diminished and it would be fair not to admit this item in evidence against D. It is difficult to discern exactly what is meant here by D. This item is therefore excluded.

Video-Link evidence

25. The complainant wishes to give evidence by way of a video-link. D opposes this. A screen is not opposed, according to a further skeleton argument produced on behalf of D. The skeleton concludes – "*It is not in the interests of justice to allow a video-link when the option of a screen is not opposed, readily available and would address any concerns the complainant has*". The complainant has made a separate statement seeking a video-link. She states she would not want to see D in the flesh, which would not happen with a screen. She adds she does not think she could deal with standing in court emotionally. "*I would not be able to speak and I would cry constantly and there would be no point in me being there."*

26. The procedure in Guernsey is governed by The Live-Link Evidence (Bailiwick of Guernsey) Ordinance, 2008. The test to apply, by virtue of Section 1(2)(c) is simply the "interests of justice". In all the circumstances the application is properly made and is granted. This is consistent with the views expressed (albeit in relation to screens) by Montgomery JA in Pinto v Law Officers 2013 GLR 83, see especially paragraphs 10-13. Time has moved on and the needs of witnesses are now taken into account. Also, as was pointed out in the course of oral submissions, D will be able to see the complaint's face on a video-link, not if she is screened physically from his view. On what is set out by the witness this special measure is justified in all the circumstances. It is in the public interest that complainants in serious sexual allegations feel able to give their evidence without inhibition or extra emotional pressure.

Conclusion

27. Accordingly, the Police interviews, and the other items of evidence, with the exception of D's message to his mother are ruled admissible. The application for a video-link succeeds. During the course of the trial the admissibility questions can be re-visited if what is given in evidence substantially differs from what has had to be considered on the committal papers. Counsels' assistance on appropriate directions will need to be sought in due course.

J R Finch

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