Law Officers of the Crown v Roze
Royal Court
18th May, 2017

JUDGMENT
60/2017

Admissibility of interviews made under caution.

IN THE ROYAL COURT OF GUERNSEY

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

-v-

YEVETTE AIMEE ROZE **Defendant**

Application to Exclude Evidence

Application heard on: 12th May, 2017
Decision handed down on: 18th May, 2017

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

Counsel for the Prosecution: Crown Advocate C Dunford
Counsel for the Defendant: Advocate P Lockwood

Cases and Materials referred to in Decision:

The Police Powers and Criminal Evidence (Bailiwick of Guernsey) Law, 2003, Section 78;
Code of Practice C, paragraph 1.6, note 1G;
The Police and Criminal Evidence Act, 1984, Section 78;
Code of Practice C, paragraph 1.4, note 1G
R v Anderson [1993] Crim L.R. 447 C.A.;
R v Parris (1989) 89 Cr. App. R. 68;
R v Walsh (1990) 91 Cr. App. R. 161;
Stanesby v D.P.P. [2012] EWHC 1320 (Admin).

Zander on PACE (sixth edition), paragraphs 8-46 to 8-47, page 396, and pages 481-482.

D E C I S I O N

1. Miss Roze ("D") has been committed to the Royal Court on a charge of being concerned in the supply of the Class B controlled drug cannabis resin. A 'not guilty' plea has been entered, but prior to the fixing of trial dates it was necessary to consider the admissibility of her interviews under caution conducted on 19th July, 2016 by D.C. Challinor, by virtue of Section 78 of the Police Powers and Criminal Evidence (Bailiwick of Guernsey) Law, 2003 ("PPACE"). This is the equivalent of Section 78 of the English Police and Criminal Evidence Act, 1984 ("PACE") and the principles followed in the English courts in relation to this provision are considered of high persuasive authority in Guernsey and, in practice, applied.

2. A *voire dire* hearing took place on 12th May, 2017. The Prosecution ("P") called two Custody Sergeants, the Shift Inspector and the interviewing Officer. D did not give evidence. Both sides had submitted helpful skeleton arguments, but the ground shifted somewhat following the evidence. It should be noted at the outset that no allegations of bad faith were made against the officers. The dispute centred around paragraph 1.6 of Code of Practice C, which deals with the "Detention, Treatment and Questioning of Persons by Police Officers". The relevant Note for Guidance is 1G. (The English PACE equivalent in Code C is paragraph 1.4 and note 1G respectively). Paragraph 1.4 is identical, Note 1G is also on the same lines, but refers to the Mental Health Act, 1983 definition of "mental disorder". Guernsey Note 1G gives a rather wider definition.

3. In considering the evidence the burden of proof was placed on P to the criminal standard. It is not clear from the English cases where the burden lies (R v Anderson [1993] Crim L.R. 447 C.A.), so this course was deemed safest. It was noted that there are no general guidelines in the application of this section in England and that each case has to be decided on its own facts. In R v Parris (1989) Cr. App. R. 68 at 72, C.A., Lord Lane CJ said that a breach of the Act or Codes does not mean that any statement made by a defendant after such a breach would necessarily be ruled "*inadmissible*". "*Every case has to be decided on its own facts*". The courts take into account fairness to the prosecution as well as to the defence. In R v Walsh (1990) 91 Cr. App. R. 161 at 163, the Court of Appeal stated that, "*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"*. (See Professor Zander's respected commentary "*Zander on PACE*" (Sixth Edition) at paragraphs 8-46 to 8-47).

4. In substance D's problem is that if evidence of these interviews (the first one was aborted due to a defect, so they are essentially one) goes in, there are damaging admissions implicating her in the offence charged. At page 14 she admits she would have "sold" cannabis to "close people", and that she would supply gratuitously to her cousins who had just come back from England. Either, of course, is serious evidence tending to prove the charge. Particular attention was given to pages 4 and 5. In the former D, in the course of a long answer explaining her drugs use, stated, "*I've got bi-polar, so I can be very up and down and cannabis just keep me on a level, a nice calm level ....."*. On the next page D further explains how she was "*addicted"* to prescription drugs, but no longer. It was submitted that her answers should have triggered paragraph 1.6 of Code C and an appropriate adult summoned.

5. To give a full picture it is helpful to consider D's responses when received into custody. The computerised "niche" system is by way of a pro-forma, operated mainly by way of a double screen, so the arrested person can see the answers (apart from the "risk assessment" section).

D has signed the relevant parts. On 19th July, 2016, D answered the question about having "*any mental health problems or depression"* in the negative. (She answered positively on her second appearance at the Police Station with her Advocate on 5th August, 2016.) It should also be noted that D, on 18th July 2016, changed her mind about not wanting legal advice and then changed her mind again and proceeded without an Advocate. Inspector McGrath saw D and enquired into this, in the presence of the interviewing officer, DC Challinor, and a full record was taken at 11:13 hours, giving the excuse of being indecisive. The Custody Record is completed fully in relation to this. D confirmed this, when again properly reminded of her rights by DC Challinor at the beginning of the interview. DC Challinor also instructed D that she need not answer questions and a full caution was given. There are two alleged "minor" technical breaches of the code which were mentioned in the oral submissions: Firstly, after the interview had to be re-started due to a defect in the recording the full caution was not repeated. Nothing hinges on this as it was only a minute or so of delay on the evidence and D's rights were adequately summarized again; secondly, reference should have been made in the interview to her change of mind and explanation to Inspector McGrath. However, this is again adequately dealt with at page 1 of the first interview. The submissions, it should be noted, did not hinge on these minor points, which do not adversely affect the overall fairness of the procedure.

6. D's submissions were concentrated on the interviewing officer, DC Challinor. The evidence obtained in the interview was "*massively prejudicial"* and although there was no bad faith on the part of the officers, an "*unfortunate combination of factors"* brought Section 78 into play. DC Challinor wrongly thought he knew best, and should have invoked the provisions of Code C. In cross-examination, this officer stated he did not get an appropriate adult. D's answer was in the context of a justification for her cannabis use, she was fit to be interviewed. He was surprised to hear she had a long history of mental health problems and did not previously suspect it. D produced a letter from her GP, Dr Hotton, dated 11th May, 2017 which dealt with her history and concluded that D was put "*in the category of being mentally vulnerable"*. There was past depression and cannabis use. DC Challinor said he had to act on his judgment and, indeed, lots of people have had mental health issues in the past. D had been through an assessment on arrest.

7. It is commentary (op. cit.), Professor Zander deals with the equivalent English position at page 396. At note 150 the case of Stanesby v D.P.P. [2012] EWHC 1320 (Admin) is discussed. This was an appeal by Case Stated from the Crown Court (presumably on an appeal from the Magistrates' Court) on a drink-driving offence based on a breath test. The appellant was found to be coherent when going through the procedure but told the Police he was taking medicine for depression. This triggered Code C and the Crown conceded in the Crown Court and High Court that an appropriate adult should have been summoned. As Mitting J said, at paragraph [7]:

> "*Those rights are of particular significance when a detained individual is being subjected to a process that he may not understand or when he is being interviewed. The case law contains examples of the exclusion of evidence of such a nature in those circumstances."*

8. The Crown Court had accepted the evidence that the Police were satisfied that the appellant was coherent and understood what was being asked and that there were no concerns about his mental stability. When tested it was accepted that the appellant appeared to understand the procedure and what was needed. The Crown Court also found that the presence of an appropriate adult would have made no difference. On these findings Mitting J also found that the breach of the Code made no difference. The appeal was dismissed and permission to appeal further refused. (The High Court, of course, was bound by the findings of fact and evaluation of evidence presented in the Case Stated.)

9. In his note, Professor Zander subjects this decision to some criticism. He concludes:

> "*The evidence was that the motorist was fully coherent, able to understand and answer questions. Given that depression covers a wide range of conditions and there was nothing to indicate that the motorist was unable to deal with the situation, it is puzzling that the prosecution conceded that there had been a breach of para 1.4. The issue deserves proper consideration by a court."*

The wording of the Codes needs to be considered. The phrase "*in the absence of clear evidence to dispel that suspicion"*, is placed after the words: "*If an officer has any suspicion, or is told in good faith, that a person of any age may be mentally disordered or otherwise mentally vulnerable …."*. On the facts in the present case the good faith of the officers is accepted. Having heard their evidence and seen them, and there being no countervailing evidence on behalf of D, their truthfulness is also accepted and found so to the criminal standard of proof. Each officer was doing their best to be accurate and fair.

10. The whole of D's interview needs to be carefully and rationally considered. It is conducted politely by DC Challinor and D is able to discuss her circumstances and actions in detail and in an unforced, indeed pretty fluent manner. She is in, when all is considered, evident good humour. Her responses are not induced even by legitimate pressure and she talks freely. The picture is produced of someone not ground down by the unfortunate and testing situation in which she finds herself. She does not present as unwell or lacking coherence or understanding of the procedure or her rights.

11. The observations of Professor Zander on the Stanesby case, are, with respect, logical and accepted in view of what the Code says. If this view is technically incorrect then that case is good authority for leaving the interview in evidence, following Mitting J's clear and economical reasoning. The summary given at pages 481-482 of "*Zander on PACE*" is adopted to describe the court's function in cases of the type under consideration:

> "*… the court generally will uphold the defence position under S.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."*

These principles do not apply in this matter and the submissions made, ably and clearly by Advocate Lockwood are therefore rejected.

12. Application refused.

J R Finch
Judge of the Royal Court

Footnote

The "Niche" system would be improved if Custody Records were produced in a strictly chronological order. The facts would have been easier to follow under the old hand-written system.