[2019]GRC051

IN THE ROYAL COURT OF GUERNSEY

Between:

THE LAW OFFICERS OF THE CROWN

("P")

-v-

NAOMI PRESTIDGE **(First Defendant) ("D1")**

-and-

RORY CHRISTOPHER McDERMOTT **(Second Defendant) ("D2")**

Ruling on Further Issues

Submissions heard on: 11th September, 2019
Ruling handed down on: 16th September, 2019

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

Counsel for the Prosecution/Law Officers: **Crown Advocate C Dunford**
Counsel for the First Defendant ("D1"): **Advocate C A Tee**
Counsel for the Second Defendant ("D2"): **Advocate M G A Dunster**

Cases and Materials referred to in Decision:

Ratten v R [1972] AC378 PC
R v Andrews [1987] AC 281, HL
R v Nye and Loan (1977) 66 Cr.App.R 252 CA
Teper v R [1952] AC480
Howe v Malkin (1878) 40 LT 196
Peacock v Harris (1836) 5Ad & El 449
R v Lynch [2008] 1CR App R 24
R v Zamon [2017] EWCA Crim 1783.

Introduction

1. This is the third decision that has had to be handed down in this case. There are 3 issues which need at this stage, at most of the way through P's case, to be resolved. The main one relates to the doctrine of "Res Gestae", which raises points that I have not encountered before, and in an unusual situation. Guernsey has not enacted legislation akin to the English Criminal Justice Act, 2003, section 118, although the Common law position is preserved in section 118(1). The other issues relate to "business records", the admission of parts of 2 documents not created for the purpose of the criminal investigation; and a related point which, it is also submitted, favours the admission of statements made by D1 in her Police interviews. The submissions have been made on behalf of D2 and D1 has not taken a position on them. Also the question of "speculation" has arisen.

Res Gestae

2. D2 wishes to admit evidence to the effect that there was *"a reasonable evidential basis"* (as P puts it in written submissions) that Lauren had a pulse after being discovered and therefore wishes to adduce this evidence. The problem is the words spoken come from D1. It is, of course, not known if D1 will give evidence. If she does not, she cannot, of course, give these details. The witness would be the person at the resuscitation scene who heard D1 speak. This person has not given evidence, so the position has to be established beforehand. The witness (NW) states in her witness statement of 10/11/17 at page 4:

> *"I saw Naomi (D1) check for a pulse and she stated she could feel one but I didn't check this myself."*

And in NW's Police interview of 8/11/17:

> *"So that was Naomi and the paramedic that I heard say that … but then we got sort of, I don't know time frames, but I presume some sort of half way through ... and he was saying that she was asystole which is … flat line."*

(There are references by D1 in her Police interviews referred to below.)

3. The Paramedic (MW) in his witness statement mentioned one of the ward staff, a female *"had pulpated a pulse prior to our arrival".* Asystole was present, i.e. a flat-line from the heart and *"the patient was and had been in asystole throughout."* This conflicts with the proposed evidence, MW is an agreed witness. The point here is that by the time the paramedics appeared on the scene there was no heart activity.

4. The Guernsey legal position is consistent with the English Law of 2003. The heads under which res gestae statements can be admitted are summarized as:

   (a) spontaneous statements about events (the *"excited utterance"* rule);
   (b) statements accompanying and explaining relevant acts; and
   (c) statements relating to physical sensation or mental states.

   Each will be dealt with in turn.

5. In relation to *"spontaneous statements"* the law is laid down by the familiar modern cases of Ratten v R [1972] AC378 PC and R v Andrews [1987] AC 281, HL. From these cases it is apparent that a statement by a person about an event in issue made in such circumstances of spontaneity or involvement in the event that the possibility of concoction or error can be disregarded, is admissible as evidence of the facts stated. It has to be an instinctive reaction to the event. Where the speaker has had the chance for detached reflection so as to be able to distort or construct the account it should be excluded. In Andrews Lord Ackner stressed the idea of a person's mind being so dominated by an event that the statement can be regarded as an instinctive reaction without the need for reasoned reflections. In R v Nye and Loan (1977) 66 Cr.App.R. 252 CA, the Court of Appeal added the requirement that the judge excludes the risk of error as well as that of fabrication. This decision is not incompatible with Ratten or Andrews if one includes error or mistake in the interpretation of *"distortion"*.

6. In relation to error, it is helpful to refer once more to Andrews (at pages 300-1). There may be special features which give rise to the possibility of error. Accordingly the trial judge must consider if he can exclude this possibility just as with *"concoction"* or *"distortion"*. Also

relevant is whether the statement in question concerns the event *"directly"*. In another well-known Privy Council case Teper v R [1952] AC480, Lord Normand said (at 487) that the event with which the words are sought to be provided must be connected with the commission of the crime itself. As Blackstone put it, at F17.54:

> *"The event which generates the statement admitted under the rule … must be the commission of the offence in question."*

As Lord Normand went on to say (at 488) *"the throwing of the stone, the striking of the blow, the setting fire to the building whatever the criminal act might be."*

7. In D1's Police interviews there are two relevant references: in the first one, page 5:

> *"I got the ligature off, I checked her pulse and I said she had a heartbeat, a pulse …"*

In the immediately preceding words D1 said:

> *"… and then they did the adrenalin, she didn't respond to it, they said that she had a dim, before they did the syringe, they said that she had a dim heartbeat…"*

But in the 3rd interview some 3 months later, at page 43, which must be of considerable significance:

> *"Yeah, when we got the ligature off I think Natalie started on her chest first and I had checked her pulse on her neck and I felt what I thought was a pulse, later on the paramedics advised me that it wasn't an active pulse like you and I it was a systolic pulse, basically they explained that it is like the heart is like that why the defib didn't work then, its like the hearts like a piece of jelly on a plate that you couldn't get an electric current to run through and that's why the defib didn't work but that's why I felt a pulse or what I thought was a pulse."*

8. The next res gestae category is in relation to statements accompanying an explaining relevant act. As P has mentioned in written submissions Blackstone (at F17.49) explains:

> *"Statements accompanying relevant acts are rarely admitted in criminal cases; the exception is limited to cases where the words spoken are "part and parcel" of an act such as identification."*

There are two venerable cases cited by P (which are mentioned in the full discussion on common-law principle in re gestae in Cross 6th edition page 584). In Howe v Malkin (1878) 40 LT 196, the evidence was rejected because the declaration was by one person and the accompanying act by another – this would apply to any purported words from the paramedic. In Peacock v Harris (1836) 5Ad & El 449 contemporaneity was emphasised: *"An act cannot be varied or qualified by insulated declarations made at a later time."* In Howe v Malkin Grove, J set out the general principle in relation to statements accompanying acts - namely it is where a statement is so bound up with the act to which it relates that the act cannot be properly understood without hearing the statement. The authorities suggest that the act must be relevant in its own right and also the statement made by the actor must relate to the act, usually by providing the actor with reasons for it. In R v Lynch [2008] 1Cr App R 24, Keene LJ observed that:

> *"The concept of words spoken being part and parcel of an act does imply a very limited scope for the exception to the hearsay rule."*

(Emphasis supplied)

9. The last category refers to statements relating to physical sensational or mental states. Blackstone at F.17.61, also mentioned in P's written submissions, states:

> *"The statements of a person in which he relates his contemporaneous bodily feelings are admissible to prove the feelings, but not their cause."*

And Archbold, at 11.82, considers that *"Such statements are admissible as being evidence of conduct from which the physical condition or emotion of the speaker can be inferred."*

Conclusions in relation to Res Gestae

10. Over the years I have encountered res gestae points from time to time in criminal cases, and when younger used to advance them. I have not, until now, seen them used by the Defence. But the words of the English statute in section 118(1) refer to *"the statement"* - there is no reason it seems to confine it to statements or acts by alleged victims or onlookers, simply because all the cases relating to res gestae are put forward by the Prosecution. That shows that the present situation is unusual and perhaps unprecedented. On considering the authorities the conclusion is (referring to each of the three categories):

    (i) spontaneous Statements. Upon considering all the material error, distortion or even concoction cannot be disregarded. D1's own words to the Police place the matter in great doubt. Nor does what is put forward relate directly to the actual commission of the alleged crime itself;

    (ii) statements accompanying or explaining relevant acts. There is as stated *"very limited scope"* for this. Cross (supra) at p583 covers the limitations on this exception by saying:

> *"... but it is important to note the limited purpose for which declarations accompanying an act may be proved at common law. They are evidence of the actors intention in acting or his reasons for doing so but they are not admissible to prove the existence of any fact mentioned in the statement of those reasons."*

    This, with respect, well sets out the considerable limitations at play here and this category also does not apply;

    (iii) statements relating to physical sensation or mental state. These may prove the persons feelings, as mentioned above, but not their cause.

11. The submissions advanced on behalf of D2 have caused a pretty detailed enquiry into the English Common Law position. It is hoped the conclusions reached are right. If I am technically wrong in some way and these matters were admissible, then I would firmly direct the Jurats that upon assessing what was said they can be considered as of a very little weight in their deliberations. This view is strengthened by the question on speculation set out below.

Business Records

12. These are contained in Appendix 28, a meeting between the hospital administration and D1; and Appendix 44 and *"investigation interview"* in relation to allegations of gross negligence

by D1 also held on hospital premises. The former was on 16/10/17 (very soon after the event), and the latter on 30/01/18. In the former it is stated:

> *"[F] asked if the service user had a pulse and Naomi said that they had felt a feint (sic) pulse."*

In the latter:

> *"NP said that when the bandage was off Lauren, she checked the bandage on her neck and wrist. There was a pulse – both her and Natalie believed there was a pulse – it was a gut reaction to start CPR."*

The Guernsey legislation governing business documents is in sections 2 and 3 of the Criminal Evidence and Miscellaneous Provisions (Bailiwick of Guernsey) Law, 2002, and on a natural reading it covers this part of the evidence – none of the exclusions appear to apply. It is only necessary to refer to section 2(i) (the equivalent of the English provision):

> *"2(i) Subject to Subsections (3) and (4) a statement in a document shall be admissible in criminal proceedings as evidence of any fact of which direct oral evidence would be admissible …"*

(It is true that D1's answers to the Police are also before the Court, but an appropriate direction on their weight would need to be fashioned - we have not yet had the advantage of the Pathologists` evidence and this may well straighten things out and assist in what should go in the summing up.) It should also be emphasised that nothing said by D1 in any of the material referred to here amounts to a *"confession"*. This simply means a statement which admits or acknowledges guilt; an admission of wrong doing. Even though the technical requirements of Section 2 of the Law are in my judgment met in respect of these two items, it was possibly open to me to find under Section 3 (on the facts as they now stand) that this material would fall to be excluded *"in the interests of justice"*. But it is more appropriate to admit it and refer to what it might convey in due course. For the sake of completeness, the provisions of PACE 1984 have no bearing on this issue.

Speculation?

13. The whole edifice erected around the presence of a pulse cannot submit P, be admitted: *"if evidence is speculative it cannot be relevant"* asserts Crown Advocate Dunford. Put simply, D2 has suggested that Lauren's suicide (or mischance) could take well less than 15 minutes. Hence the admittedly negligent failures of D2 (and D1) to carry out level 2 15 minute checks undermine the essential element of causation in these cases. Plainly, more will be heard from the two Pathologists, but we have to deal with this as we now are situated, if we can. It has already been indicated, in an earlier judgment, that broadly speaking the evidence has to be looked at *"in the round"* – as in R v Zamon [2017] EWCA Crim 1783. As P puts it in his written submissions:

> *"All that is known is that Lauren left the main ward at 1245 with a bandage still on her arm. It is then known through reasonable inference that between that time and 0242 she unwrapped the bandage, tied it tightly around her throat causing death. No more is known…"*

He adds:

"In short the Pathology evidence should not be considered in isolation and the whole process of being awake to move into a decision to apply the ligature has to be considered and is capable of consideration as a reasonable inference as we know it happened. On any analysis this would extend the relevant period to consider well beyond the time identified in the Pathologist's evidence advanced by D2."

14. P also gives a list ((a) to (s)) of things known, and a greater number of things unknown at paragraph 18 of his written submissions dated 10/9/19. He states that *"All of the unknown points will remain unknown by the end of the evidence."* In summary, there is no tangible evidence available on the process Lauren employed to produce and use the ligature. D2's position statement deals with this aspect in some detail and states that defence expert evidence will show that the time from ligature application to death may well have been as little as around 2 minutes. Hence, Advocate Dunster concludes, *"Even if the duties had not been breached and the duties had been carried out, the Prosecution cannot show beyond reasonable doubt that would not have occurred."* P responds (para 21), *"It is a false approach to just look at the point of no return and then apply the apparent MINIMUM time from ligature to death."*

15. We have not yet heard from the Pathologists. The appropriate direction will need to be fashioned once this is in. If there is some evidential basis for Advocate Dunster's propositions then that will be set-out. There will need anyway to be a reference in this case along the lines of *"You must not however engage in guess-work or speculation about matters which have not been based on any evidence."* So here a strong direction might be needed. At this stage, apart from marking that possibility, it would be premature to rule D2's position as untenable or inadmissible. This might be the situation, but more needs to be heard.

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

16th September 2019