Law Officers of the Crown v Jehan
Royal Court
12th November 2018

JUDGMENT
53/2018

Application to exclude evidence

IN THE ROYAL COURT OF GUERNSEY

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

-v-

LEE NATHAN JEHAN **Defendant**

Application to Exclude Evidence

Application heard on: 24th & 25th September, 2018
Decision handed down on: 12th November, 2018

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

Counsel for the Prosecution: Crown Advocate C G Dunford
Counsel for the Defendant: Advocate S J Maindonald

Cases and Materials referred to in Decision:

R v Aspinall [1999] 2 Cr. App. R.115;
R v Barry (1991) 95 Cr. App. R 384;
Beattie v R [2018] NICA 1;
R v Dunford (1990) 91 Cr. App. R. 150;
R v Gill [2004] EWCA Crim 3245;
R v O'Brien [2000] EWCA Crim 3;
Stanesby v DPP [2012] EWHC 1320 (Admin);
R v Walsh (1990) 91 Cr. App. R. 161;

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Law Officers v Correia (17/8/15)

The Police and Criminal Evidence Act, 1984, Sections 76 and 78;

The Police Powers and Criminal Evidence (Bailiwick of Guernsey) Law 2003, Sections 76 and 78, and Code of Practice C.

Zander on PACE, Parts V and VI.

Archbold, paragraph 15-443.

Introduction

1. The Defendant ("D") is charged with five counts involving assault, resisting the Police, plus two drug offences - he made significant admissions during his Police interview (effectively one session, although the tape was changed), which if accepted at trial must, in practical terms, be likely to establish his guilt. There is an application under Sections 76 and 78 of the Police Powers and Criminal Evidence (Bailiwick of Guernsey) Law, 2003 ("PPACE") to exclude the interview on the ground that D was at the time suffering from being "mentally vulnerable" within the meaning of Code C of PPACE, paragraphs 1.6 and 11.15. At the *voir dire* on 24th and 25th September, 2018, oral evidence was heard from the various Custody Officers, the interviewing officer, the two Police Forensic Medical Examiners and a Defence expert, also well-experienced in such matters, who appeared via video link. No evidence was provided by D himself, but the disc of the interview was played in court for its contents and nature to be assessed. Closing submissions were, due to time constraints, made in writing by both counsel.

2. The Guernsey legislation is on all forms with the English Police and Criminal Evidence Act 1984 ("PACE"). Paragraph 1.6 of the Guernsey Code of Practice C is the equivalent of Paragraph 1.4 in the corresponding English Code C. The relevant Note for Guidance is 1G in both statutes. The relevant definition is that of "mentally vulnerable". Guernsey Note 1G states that:

> ""Mentally vulnerable" applies to any detainee, who, because of their mental state or capacity, may not understand the significance of what is said of questions or of their replies".

And:

> "When the custody officer has any doubts about the mental state or capacity of a detainee that detainee should be treated as mentally vulnerable and an appropriate adult called."

Legal Framework

3. Both Sections 76 and 78 are involved. There are a considerable number of English cases on this area of the law, and it is proposed to follow them in view of the legislation being in identical terms. There are also some recent Guernsey decisions at Royal Court level which can be considered. At the outset, it is worth reiterating the view that the burden lies on the Prosecution in respect of the operation of both sections to the criminal standard. It is only necessary to add that Section 76 refers to confessions and in particular Section 76(2)(b) allows for confessions to be excluded where "unreliable", with the Prosecution ("P") having to prove beyond reasonable doubt that a confession was not obtained "in consequence of

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". Section 78, which (at least in Guernsey) is deployed more often and has more cases devoted to it is excluding evidence that would have "such an adverse effect on the fairness of the proceedings that the court ought not to admit it".

4. In relation specifically to the provision of an appropriate adult, the first English case to consider is R v Aspinall [1999] 2 Cr. App. R 115. This made the important point that:

> "The question which the Recorder had to determine was not whether the appellant's condition obviated the need for an appropriate adult to be present, but whether the admission of the evidence would have such an adverse effect upon fairness that it should be excluded."

There was, on the facts a strong case in favour of the Appellant, as the Police were aware before interview that he was a schizophrenic on regular medication; with one Police Doctor diagnosing classic mental illness (not "mental vulnerability", it is noted), paranoid schizophrenia, and the other diagnosing schizophrenia. In view of this, despite the two Doctors finding him lucid and fit (one said 'probably fit') for interview, an appropriate adult should have been obtained and his confession fell to be excluded on appeal. In the words of Zander on PACE (6-33) this case means that the Court of Appeal "held that it is an absolute requirement for an appropriate adult to be present if a suspect who is known to suffer from mental illness is being interviewed" (emphasis supplied) even if lucid and authorized by a doctor. This case (and others) was considered in R v Gill [2004] EWCA Crim 3245. At paragraph 68 Newman J giving the judgment, set out five propositions established by the cases:

> "(1) When an application is made under Section 76 the court does not consider the reliability of the confession which has been made, but a hypothetical question. The court must decide whether, in the circumstances prevailing at the time, there is a likelihood any confession made at that time would be unreliable.
>
> (2) The words "anything said or done" are wide enough to include an omission, for example, to interview a suspect without the presence of an appropriate adult, in circumstances where the Code of Conduct requires one to be present.
>
> (3) It may in some cases be material to consider whether a breach of the Code has occurred, but where, as in this case, it was not known to the Police at the time that the intelligence quotient of the applicant placed him in a category which entitled him to the presence of an appropriate adult, it is the consequences of the loss of the protection which the code intended him to have, not whether there has been a breach, which is relevant.
>
> (4) The relevant question is whether, having regard to the purpose for which an appropriate adult is required, the absence on the occasion of the protection which such presence would have provided is likely to have rendered any confession made at that time unreliable. In short, would the presence of an appropriate adult have made any difference?
>
> (5) The application of Section 78 does not give rise, in the circumstances of this case, to any materially different considerations."

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Newman J added (importantly it is considered) at paragraph 72:

> "It does not follow that the absence of an appropriate adult, in circumstances where one should have been present, will automatically give rise to the exclusion of a confession. Each case must be considered on its own facts. The applicant does not suffer from a mental disorder."

5. Further guidance is provided in Archbold. At paragraph 15.443 reference is made to R v O'Brien [2000] EWCA Crim 3:

> "Nothing in the authorities limits or defines the particular form of mental or psychological disorder. The disorder must not only be of a type which might render a confession unreliable, but there must also be a significant deviation from the norm shown; and there must be a history pre-dating the making of admissions which is not based solely on a history given by the subject and which points to or explains the abnormality or abnormalities."

These observations are considered relevant to the present case and have to be applied to the facts found.

6. Throughout the process of considering the application of Section 76 it is necessary not to depart from basic principles, e.g. as set out in another English case, R v Barry (1991) 95 Cr. App. R 384: (i) "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? That represents the background against which the particular facts of the present case must be assessed i.e. in relation to Section 76.

7. Section 78 has been more common and has been the principal factor in a number of Guernsey cases. In Law Officers v Correia (17/8/15) it was sought to set out the relevant principles at paragraph 18 of the judgment:

> "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."
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> 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."

Evidence and Findings thereon

8. Evidence on behalf of P was called with the following witnesses:

Dr Eustace	}	
	}	medical examiners
Dr McKerrell	}	

Sergeant (now Inspector) Stuart	}	
Detective Sergeant Tanner	}	
Inspector McGrath	}	Custody or Review officers
Sergeant Rowe	}	

DC Lowe – interviewing officer

D called Dr Spincer, described as a "very experienced forensic physician for nearly thirty years".

9. All of the witnesses gave evidence in a straightforward fashion. The court also had the benefit of Dr Spincer's two written reports. It is worthy of note that he withdrew a comment at paragraph 9.5 of his first report that the interview was "unreliable and poorly conducted", instead emphasizing that an appropriate adult should have been provided. Dr Eustace and Dr McKerrell were more restrained and cautious in their evidence than Dr Spincer, who was confident, affable and outgoing, as well as more voluble. The Police witnesses gave evidence in an honest way. Sergeant Rowe had to rely totally on the written records (especially the Custody Record or "CR") and is not to be criticized for doing so in a case well over a year ago, after which many cases have had to be dealt with. The CR was a full record with the detail one would expect. The medical entries by Doctors Eustace and McKerrell were, on the whole, short and to the point. They too, to a great extent, had to supplement their recollection from the documents. They relied on the Doctors' Register held at the Police station. Both Doctors were of the view, at the time, that D was fit to detain and fit to interview and did not need an appropriate adult. Dr McKerrell considered, after reading Dr Spincer's report that D did need an appropriate adult. A good extent of his motivation for this change in his opinion was that D did not have the services of an Advocate. An Advocate, of course, cannot be an appropriate adult. Even if one had been called that would not by itself cure any breach of Code C in relation to an appropriate adult.

10. As was submitted on behalf of P, the decision by D not to have legal advice is "a totally separate consideration" to the appropriate adult issue. One has recourse to Code C 1.6, which poses two questions, which are really different aspects of the same point: did the Custody Officer have a suspicion that D was mentally vulnerable or mentally disturbed? On the evidence the reply was negative; and was an officer told in good faith that D was mentally disordered or otherwise mentally vulnerable? Again the answer is no. To further understand this, the evidence of the two Doctors who actually saw D (unlike, of course, Dr Spincer) needs to be considered. One views this at the time, not with the distorting lens of hindsight. Their accounts tally. Dr Eustace relied on the Custody Officer to give D's relevant history, was aware of his self-harm attempts and his addiction to Diazepam and misuse of Suboxone, and considered D to be drunk and only fit for interview at 7 am. He found no indication of under lying mental health issues). He was principally concerned with the alcohol wearing off. D did not suffer delusions and engaged well. He was criticized for the brevity of his two examinations: 10 minutes for the first, 15 minutes for the second. Dr McKerrell found D lucid, very articulate, not depressed or "low" and not smelling of alcohol. He also relied on the Custody Officer and did not consult the CR. Both Doctors were also concerned with D's

physical injuries, a minor head injury which was of no concern and trauma to D's leg, which had had a pin inserted previously. Dr McKerrell did not access GP or psychiatric records, although he saw D during working hours.

11. As mentioned, Dr Spincer withdrew his comment about the interview. He considered, however, that an appropriate adult was needed. He based this on a number of factors, particularly how D presented himself and behaved after arrest. D should not have been interviewed at all due to his mental vulnerability and whilst an appropriate adult could not provide legal advice, he or she would have advised D to seek an Advocate. He agreed D bad been given details of his rights "but whether he understood them is another thing". He also considered that D declining legal advice should have occasioned anxiety for the custody and reviewing officers. D was an alcoholic, depressive and a drug-user and mentally vulnerable.

12. D was given his "rights" on a number of occasions: by Inspector McGrath just before midnight on 5th September, when reviewing the matter; by Sergeant Rowe the next day at 07:19; by Inspector Stuart at 08:45 that same morning and at the beginning of both interview tapes by DC Lowe. As stated, the interviews were played. D was not given a hasty version of his right to legal advice, but DC Lowe was careful to give it in full and straightforward terms. The interview was conducted fairly, with an element of rapport between D and the interviewing officers. There was no oppression and D was full in his responses and largely forthcoming. He was careful not to "grass-up" his drugs suppliers, on two separate occasions (pages 71 and 82).

13. Upon considering the Police evidence, it is D's submission (see especially paragraphs 26-27 of the main skeleton) that there was reason to deem D mentally vulnerable, even before he arrived in custody. He had stated self-harming 2 days before, said he was going "to slit his wrists" and was seen banging his head repeatedly against the van. The Police are criticized for not providing Dr McKerrell in particular, with the relevant history that might have caused him to obtain further information about D. There is an allegation amounting to bad faith in paragraph 28 of D's skeleton in relation to Sergeant Rowe. This is based, it is stated, on a number of omissions in providing relevant information to Dr McKerrell.

Observations

14. Neither Doctor who examined D considered that he was in need of an appropriate adult at the time. Dr McKerrell's view that he was, is based on the lack of an Advocate. As previously stated, these are two different issues (see paragraph 9 above). Dr Spincer withdrew his negative opinion on the interviewing of D and it is apparent also, when considering this that it was indeed correctly-conducted and D was perfectly able to avoid naming his drugs suppliers. There was nothing of concern in the conduct of the interview and the Police were then and earlier scrupulous in advising D of his right to an Advocate. This is not one of those cases (mainly from the years immediately following PACE in England) where there was sharp practice or cynical avoidance of D's rights. The allegation of bad faith at paragraph 28 of D's skeleton should not have been made, there is not a scintilla of evidence to show that - this is found as a fact on considering and assessing all the evidence, written and "live".

15. The duties of an appropriate adult are the same as in the English Code C. They should be informed that they are not simply there to act as an observer, and that they are there to advise the detained person, observe whether the interview is being conducted fairly and properly and to facilitate communication with the person being interviewed. Dr Spincer's principal concern, it can be deduced from his oral evidence, was the lack of an Advocate. But this had been explained, perfectly properly to D throughout his detention and at his interview (also repeated). His replies show a rational decision not to have one present. It cannot be forced.

D's responses to questioning were lucid and understandable. The English case of Stanesby v DPP [2012] EWHC 1320 (Admin) is of interest here. The appellant had informed the Custody Officer prior to a breath test that he was under treatment for depression. Surprisingly it was conceded that there was a breach of C1.4 and that an appropriate adult should have been summoned. D was coherent, co-operative and fully understood the questions. It was noted that by virtue of R v Gill (supra) every case had to be decided on its own facts. The Crown Court (on appeal) concluded:

> "Even if an appropriate adult had attended, no comfort or advice provided by such a person could have invoked any justifiable interference with the breath test procedure undertaken. Accordingly, we declined to exclude the evidence."

As Mitting J concluded in the Divisional Court:

> "This was a case in which the breach of the Code made no difference."

This case is akin to the present matter, as this court like the Crown Court in Stanesby finds the evidence of the Police custody and Review Officers truthful and *bona fide*. D understood the questions put to him and was able to answer coherently and indeed civilly. The only caveat in Stanesby, as pointed out by Professor Zander, is that the concession there was "puzzling" and there was nothing to show that the appellant was unable to deal with the situation. This, with respect, is surely correct.

16. Another interesting case of some relevance is the recent Northern Ireland decision in Beattie v R [2018] NICA 1. This also involved a *voir dire*, with expert evidence for the defence by a well-qualified forensic medical officer. In short this was a perverting the course of justice case where the appellant (a policeman) had a past history of depression and there was evidence of suicidal thoughts. Again R v Gill was applied, by the Lord Chief Justice. The Police Forensic Medical Examiner saw the appellant and considered he was "orientated, understood the situation that he was in and was perfectly able to answer questions". He had the advantage of actually seeing the person. The defence expert concluded that the appellant was vulnerable "to giving reliable information and a false confession". In dismissing the appeal the Lord Chief Justice observed that "the fact that Dr Harrison saw the appellant placed him at a considerable advantage". There was therefore no breach of Code C in the circumstances, as the appellant was not "mentally vulnerable" at the relevant time. No case is the same as another and it has to be noted that in Beattie, the appellant did have legal representation and the solicitor did not require an appropriate adult. The decision, however, is particularly relevant for further underpinning R v Gill and stressing that each case is decided on its own merits.

17. On the facts in the present case it is open to the court to find, and it does, that D was coherent, able to understand the questions, repeatedly advised as to his right to consult an Advocate, and able to deal with what was put to him to the extent (already mentioned) of refusing to implicate his drug suppliers. There was no bad faith on the part of the Police, indeed good faith throughout the procedures. There was criticism that the lack of perceived need for an appropriate adult was not recorded and also the Doctors were not shown the CR. They did see the specific Doctors' Register, also in 15 years Dr McKerrell had never seen a CR. As P's "reply" puts it, at paragraph 3, "there is nothing in the Codes that means it must be provided". D's submissions here are the counsel of a perfection that is not reasonably achievable in a Custody Suite. If dealing with practicalities it is also worthy of note that, unfortunately, many detained persons will bang their heads on Police vans (or on cell walls), a great many will be drug-users, and a significant number will resort to self-harming. It is necessary to deal with each case as it presents itself. The same considerations apply to the Section 78 aspect of this

matter; paragraph 7 above deals with the cases, and both R v Walsh (supra) and R v Dunford (supra) apply on the facts found and have been applied e.g. in Law Officers v Correia (supra) in Guernsey.

18. If the conclusion that there was no breach of Code C is technically incorrect on these facts then the interview should still be admitted. It is accepted that good faith (as opposed to bad faith) is not a determinative factor in making this assessment, but here it is relevant. In relation to the Section 76 limb of the case, failure to ensure the presence of an appropriate adult will not necessarily result in the confessions being inadmissible; again the individual circumstances of the case need to be looked at and evaluated. But in the present case the Section 76 and Section 78 factors are closely intertwined and similar considerations apply. Here, on the facts, any breach of Code C is neither flagrant, nor deliberate, and does not vitiate the admissions - should (contrary to the main conclusion) such a breach be made out. In all the circumstances relying upon the interview is not unfair and the admissions should stay in.

19. Accordingly, on considering and weighing all the evidence and applying the authorities that are considered relevant, the confession is found to be reliable, an appropriate adult was not needed and would not in the circumstances have made a difference, and there is not unfairness that requires the interviews to be excluded.

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

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