

Application under section 78 of the Police Powers and Criminal Evidence (Bailiwick of Guernsey) Law 2003, for the exclusion from the Defendant’s trial for possession of certain drugs with the intent to supply such drugs, of a confession he made to a Probation Officer in the course of the preparation of a social enquiry report for an offence against the Regulation of Investigatory Powers (Bailiwick of Guernsey) Law, 2003.

[2022]GRC027

**IN THE ROYAL COURT OF GUERNSEY
(CRIMINAL DIVISION)**

Between:

ROCCO GUILBERT

Defendant

and

LAW OFFICERS OF THE CROWN

Prosecution

Application by the Defendant to exclude evidence under section 78 of PPACE

Case heard on: 14th January 2022

PD Judgment handed down: 25th January, 2022

Judgement handed down: 17th February, 2022

Before: Catherine Maureen Fooks, Judge of the Royal Court

Counsel for the Defendant: Advocate S E Steel

Counsel for the Prosecution: Advocate M Davies

Legislation, texts and cases referred to in Decision:

The Police Powers and Criminal Evidence (Bailiwick of Guernsey) Law 2003

The Regulation of Investigatory Powers (Bailiwick of Guernsey) Law, 2003

The Probation (Bailiwick of Guernsey) law 2018, as amended

R v Colin Woods Elleray 2003 WL 270759 (2003)

R v McDonald CA 23.7.90

R v Samuel 1988 QB 615

Barras, Watt and Orchard v Law Officers 2021 GCA045

Introduction

1. This is an application by the Defendant under section 78 of the Police Powers and Criminal Evidence (Bailiwick of Guernsey) Law 2003 (“PPACE”) for the exclusion from his trial for possession of certain drugs namely 90 tablets (42.89 grammes) of MDMA with the intent to supply those tablets (“the Supply Offence”) of a confession he made to a Probation Officer, Ms Isobel Richmond (“the Probation Officer”) in the course of the preparation of a social enquiry report on him (“the SER”) for an offence against the Regulation of Investigatory Powers (Bailiwick of Guernsey) Law, 2003 (“the RIPL Offence”).

2. The Defendant's application and skeleton argument are to be found in one document dated the 3rd November 2021. The Prosecution opposes the application and filed submissions dated the 25th November 2021. At an oral hearing on 14th January 2021 evidence was given by the Probation Officer, who was called by the Prosecution as a witness, and counsel made oral submissions. I am grateful to counsel for providing me with succinct and well-argued submissions.

Background Facts

3. The background to the RIPL and Supply offences are that, on 20th June 2020, Police Officers attended in the execution of a search warrant at the home address of the Defendant, his mother, her partner and their three young children. The search revealed a number of items consistent with drug use in the Defendant's bedroom and elsewhere. The MDMA and a quantity of cash were found in the bedroom shared by the three young children. The Defendant was 17 years old at the time, his date of birth being 4th February 2003. His mother, her partner and the Defendant were arrested. The Defendant made no comment in respect of all questions put to him and refused to provide the pass code to his phone which led to the prosecution of the RIPL Offence. This, at least in part, frustrated the investigation in respect of the MDMA resulting in a decision that no one was to be charged in respect of the MDMA. The Defendant's mother and her partner were subsequently sentenced by the Royal Court in respect of various other drug offences.
4. The Defendant was charged with the RIPL offence and was committed to the Royal Court on 5th May 2021 and his sentencing was due to take place on 29th July 2021. The SER dated 26th July 2021 disclosed that the Defendant had told the Probation Officer that he had been asked to hold the money and the MDMA (a Class A drug) "by a mate" although at the time he claimed that he did not know what type of drugs were in the package. It is common ground that those words amount to a confession that the Defendant has possessed the MDMA with intent to supply another namely, on his evidence, the person who gave the drugs to him and who might be described as the owner.
5. The Defendant went on to explain that, had he known that the drugs were Class A before accepting the package to look after, he would have declined the request. He also offered that his mother and her partner, despite being arrested for a different set of drug offences, would not have condoned his involvement with what they consider to be "hard drugs".
6. Following sight of the confession contained in the SER ahead of the sentencing hearing on the RIPL matter, the sentencing hearing was adjourned to enable the Law Officers to consider whether or not to prosecute the Defendant in respect of the Supply Offence. They decided to proceed and he was committed to the Royal Court on the 6th October 2021 on an indictment containing a single count of possession of MDMA with intent to supply to which he entered a not guilty plea on the 14th October 2021. It was anticipated that an application would be made for exclusion of the evidence. A hearing was set for November, but the decision was taken to call the Probation Officer, who is not always on Island, and the matter was therefore adjourned to the 14th of January 2022 when she was available. It was important that she gave evidence.
7. Advocate Davies for the Prosecution very fairly indicated that, if the application were successful, there would be no prosecution as the evidence upon which the Prosecution would rely is solely the confession.

The Evidence of the Probation Officer

8. The Probation Officer is currently employed on a sessional basis and has over 26 years' experience as a Probation Officer in the course of which she estimated that she was writing 28 to 30 reports per year when working on a full-time basis. She is a qualified social worker.

9. The Probation Officer explained her understanding of her duties namely to assist the Court with decision making with regard to sentence, to provide an analysis of offending behaviour, looking to understand what might trigger offending and generally to provide a risk assessment. The gathering of information with a defendant is a long process, usually taking two to three hours in which the Probation Officer asks a lot of questions about the background and about the prosecution documentation which the Probation Officer has seen in advance. The exercise looks at the offence in terms of “what, when, where, why and how”, looking at culpability, victim awareness and awareness of the impact of the offending, all set in the context of the individual offender.
10. The Probation Officer very helpfully ran through her usual procedure including the preamble to the interview in which she would typically explain that the Probation report was confidential, that it would not be read in Court without the permission of the Defendant, that it would be seen by the Prosecution, Defence and the Court and that the offender would also see the report beforehand. The process is a two-stage process with two “interviews” (she used that word specifically), the first to gather information and the second to go through the report at which time there might be additions.
11. She described her interviewing style as a “meanderer”, asking open ended questions such as “can you tell me?” “can you describe?”. She said that she is gathering information, not trying to trip up an offender. She is trying to tease out any cognitive dissonance. She made the point that the report is an analysis and sometimes it contains material which makes an offender feel uncomfortable or awkward. The Defendant had not raised anything about the content of the report at the second meeting.
12. Once the report has been written, the procedure is to have a gatekeeping exercise whereby another Probation Officer reads the report to check basics like spelling and grammar but also, more importantly, to make sure that the risk assessment and recommendation flow from the information gathered.
13. The Probation Officer then ran through the process in relation to the Defendant. She had in front of her notes and I granted a short adjournment as Advocate Steel had not seen them. It was not considered necessary for them to be adduced in evidence.
14. The Probation Officer explained that the first appointment with the Defendant had been on 18th June 2021 and the second, for the report to be read through, on the 29th June 2021 aiming for a Court date of the 29th July.
15. Prior to the first meeting with the Defendant, the Probation Officer had read the Prosecution outline and police information. She specifically noted from the papers that there would be no further action in connection with the drugs found in the house. She described the Defendant’s interview with her as very straight-forward. She asked him questions about the Prosecution outline. She could not recall verbatim what had been said about no further action but it was along the lines of her expressing that she was very surprised that there was to be no further action in respect of the drugs. She described the Defendant as very compliant, very forthcoming, very engaging and as “open, honest and keen to tell the truth”. She noted that he had matured between her two meetings with him. She was aware that he had answered no comment when interviewed and was surprised that he was so open with her.
16. She considered it “salient” that he had made the admission as that explained why he had not provided the passcode.
17. In terms of the RIPL offence, she noted that people might have their reasons for not giving a passcode such as being frightened of the consequences of others’ names being uncovered. She

described giving a RIPL offender scenarios like that to establish whether that might be the reason or whether there might be any element of duress not to reveal the passcode. She was clear that the Defendant was very keen to say that he had not been under any duress.

18. The Probation Officer was able to recall the point at which the Defendant said that he had been asked to hold the drugs and then give them back and she had recorded that in her notes. She said that, immediately beforehand he said that he had been embarrassed because there were sexual images on his phone, and he told her that he had made an informed choice not to disclose his pass code despite the seriousness of not disclosing it. He was concerned because his mum had not known that there were drugs in the house. The Probation Officer could not say if he was more worried about his mum finding out than the authorities, but she noted that he has very strong respect for his mum.
19. The Probation Officer, very fairly and frankly said that it didn't cross her mind to consider taking any different or particular action at the point he made the confession. She could only surmise that the fact that she had seen in black and white in the papers that there would be no further action stopped her from thinking about the issue further. It was clear that she viewed the information she was gathering as the foundation in showing what was instrumental in the offence with which she was dealing. The decision that there would be no further action was in the back of her mind. It didn't cross her mind to stop the interview and get the police involved.
20. When asked in cross examination, the Probation Officer explained that her training had not covered specifically the circumstance in which someone admitted a more serious offence in the course of an interview and she confirmed that she had been involved in the training of other Probation Officers in which that issue had not been considered. She explained that there were guidelines and there was training in relation to the confidentiality of reports and the circumstances in which that confidentiality might be breached, for example, were a person to disclose a risk of harm to others or themselves. She had not encountered a situation where she needed to stop an interview because an offender had disclosed a more serious offence. In her experience, sometimes defendants indicated that they were not going to say anything because they did not wish to implicate themselves in other offences. In interview, offenders did sometimes admit offences such as smoking cannabis and they would be told that that was still illegal but the situation here she said, "just doesn't happen". She said that, by the time it got to Probation, all the work on the case had been done, the person has pleaded guilty or been found guilty.
21. Advocate Steel asked the Probation Officer if she understood, at the time, that the admission by the Defendant that he was holding the drugs to give back to another person constituted possession with intent to supply in the legal sense to which she replied that she had not and that it had not crossed her mind. She is aware of the sentencing guidelines generally and the seriousness of drug offences. At the time, she had not viewed his admission as a confession rather as part of a general discussion about his offending behaviour. Asked whether, had she known at the time that he had admitted such a serious offence, she would have stopped the interview so that he could take advice she said she could only answer that in the present day. She suspected that she probably thought that there would be no further action come what may when he was giving her the background information. She had highlighted it on the Prosecution outline.
22. She was not expecting that her report would lead to a Prosecution.
23. It was her opinion that the admission should be seen in the context of his youth. He had not been involved in the Court process previously.

24. Asked whether, given the fact that he had not been involved in the Court process previously and the seriousness of the offence, did she accept that she should have stopped so that he could take legal advice, she said that, with hindsight, that would have been a good idea.

The Applicable Legal Principles

25. There is no dispute as to the applicable legal principles. Section 78 (1) of PPACE reads as follows:

“In any proceedings the Court may refuse to allow evidence on which the Prosecution proposes to rely to be given if it appears to the Court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the Court ought not to admit it.”

26. It is common ground that I have discretion to exclude the confession. Advocate Steel included in his submission reference to the case of Samuel 1988 QB 615 in which it is said that it was undesirable for the Court to give general guidance on the way in which a judge’s discretion under section 78 or under his inherent powers should be exercised, because circumstances may vary infinitely.
27. Advocate Steel helpfully filed the English case of R v Colin Woods Elleray 2003 WL 270759 (2003) in which confessions to the Probation Service were considered. In that case the appellant was being sentenced for indecent assault against a woman. In the course of his interviews with Probation, he made a confession that he had raped the complainant on a number of occasions. That confession was repeated during further Probation interviews. The Prosecution decided to prosecute him for rape. The only evidence comprised his confessions. In due course he applied for the confession to be excluded which application failed at first instance. At trial there was a dispute of fact as to what exactly had been said to the Probation Officers. The Probation Officers said that the Defendant had repeated the confession notwithstanding knowing that it would appear in the report. The Defendant appealed the refusal to exclude the confession evidence.
28. Lord Woolf of Barnes, then Lord Chief Justice of England and Wales, delivering the judgement of the Court noted, at paragraph 9, that the circumstances of the case are unusual. He then referred to the case of R v McDonald which concerned admissions made by a Defendant to a psychiatrist who was preparing a report as to the mental condition of the Defendant. The first point under consideration was whether there was any duty of confidentiality and the Court of Appeal ruled that there was no privilege of confidentiality attaching to that particular communication. The next point taken in that case was that the confession should be excluded because it had been obtained by unfair means. No such application is made in the case before me so we can move on to the third challenge which was based on section 78 of the Police and Criminal Evidence Act 1984 of which our section 78 PPACE is a copy. Counsel in the McDonald case had argued the admission of the confession should be excluded because, at the time of the questioning by the doctor, there was no effective protective procedure in the form of caution or legal advice or the defendant being invited to sign the doctor's notes. It was asserted that the doctor in those circumstances had an aura of trust and confidence which encouraged the defendant to say things with a frankness that he would otherwise not display. It was stated that the doctor was in effect a “Trojan horse”.
29. His lordship then set out the conclusion of the Court of Appeal in McDonald which included the following passage:

“in the end the question is one for the trial judge’s discretion and his sense of fairness. His cardinal duty in a criminal trial is to see that it is conducted fairly. There is no burden on the Prosecution to disprove unfairness Fairness involves balancing the interests of the Prosecution as well as the Defence. The duty is to be fair to both sides”.

30. There are 3 paragraphs of Elleray which were considered in detail in the course of the hearing before me:

“10. Although that case referred to an offender being interviewed by a doctor, there are clear analogies as it seems to us between that situation and an interview by a probation officer for the purpose of preparing a pre-sentence report. A probation officer is under a duty to prepare a report which clearly and frankly sets out the probation officer’s view, in particular in relation to sexual offenders, as to the degree of risk to the public that an offender constitutes. In order to do this in many cases they have to ask questions of an offender as to the precise circumstances in which the offender came to commit the offence to which he may have already pleaded guilty, or in relation to which there may be an agreed basis of facts between the prosecution and the defence. If in the course of that interview the offender volunteers an admission of committing the particular offence or some other offence which is relevant to the task of the probation officer in preparing their report for the court, they cannot ignore what they have been told. They are under a duty to provide a full and frank report which includes those details. Usually there will be little risk of any danger of action being taken in relation to an offender in consequence of anything said to the probation officers or anything said in a report. However, as this case illustrates, there can be a situation where that can arise.

11. We are grateful to Mr Greene for drawing our attention to the judgment of this court in R v Stokes (3.2.00, Ref No 9901149/Z5), where on an application for leave a similar situation arose. As was indicated in the judgment of the court in that case given by Sir Charles McCullough on the application for leave, there can be no question of the evidence being automatically excluded because it consisted of an admission made to a probation officer. The matter has to be considered, as was done by the trial judge in this case, by deciding whether there is a basis for excluding it under section 78 of the Police and Criminal Evidence Act 1984. However, the fact that the evidence may be admissible in criminal proceedings does not mean that the fact that the admission was made in the course of an interview between an offender and a probation officer should be ignored. It is clearly important that there should be frankness in the exchanges between a probation officer and an offender as this furthers the role of the probation officer in the sentencing exercise. If it were to be the practice that the prosecution regularly rely upon what is said by an offender to a probation officer as evidence for further prosecutions then clearly this would have an adverse effect upon his need for frankness. Indeed a situation could soon arise where probation officers would be hampered in performing their important duty to assist the court in determining the correct sentence for offenders. So in the case of an admission the prosecution should first carefully consider whether it is right to rely upon evidence provided by a conversation between a probation officer and an offender and only rely upon it if they decide it is in the public interests so to do. If they do decide to rely upon that evidence, having taken into account the considerations of public interest to which we have made reference, then the court still has a discretion under section 78 of the 1984 Act to ensure that no unfairness will occur because of the reliance on the admissions which an offender is alleged to have made. In deciding whether to exclude the evidence it is perfectly appropriate for the court to have in mind the contrast between the position that exists where an offender is interviewed by the police and that which exists when the offender is interviewed by a probation officer. The court should bear in mind

the need for frankness between the offender and the probation officer; the fact that there may not be a reliable record of what was said; that the offender has not been cautioned; and that the offender has not had the benefit of legal representation. The protection which the court can provide under section 78 in the majority of cases should be sufficient to ensure that no unfairness occurs to an offender.

12. *Reference has already been made to the steps which were taken by the probation officers in this particular case. A course which in some cases may be appropriate if an offender starts making a confession is to stop him and ask him whether he would like to see his solicitor before he makes any further remarks. Probation officers should exercise judgment as to the appropriate course to adopt in the particular case. It is not possible for this court to lay down guidance for probation officers as to what they should do, other than to indicate that if they fear that there is any risk of unfairness to an offender, they should take whatever appropriate action they think is necessary to protect the offender from any unfairness."*

31. Insofar as Elleray sets out the duty of Probation Officers, it must be remembered that, in Guernsey, the role and duties of a Probation Officer are set out in the Probation (Bailiwick of Guernsey) Law 2018 as amended ("the 2018 Law"). Under Section 1 of that law a Probation Officer's principal function is to protect the public and to work with offenders to reduce offending and to aid rehabilitation. Paragraph 2 (3) states that:

"for the avoidance of doubt, a Probation Officer has an overriding duty to the Court to act with independence in the interests of justice and must assist the Court in the administration of justice"

32. Section 5 of the 2018 Law sets out what should be included in a SER:

*"5. (1) A Court considering making a Probation Order shall obtain and consider a written or verbal report ("**a social enquiry report**") from a Probation Officer or a designated person with a view to assisting the Court in determining the most suitable method of dealing with the offender.*

(2) A social enquiry report shall include –

(a) an assessment of the –

- (i) behaviour,*
- (ii) personal circumstances,*
- (iii) risk of re-offending, and*
- (iv) risk of harm to others, of the offender, and*

(b) an assessment of the interventions available and the suitability of the offender for the available interventions."

This accorded exactly with the Probation Officer's evidence of her own understanding of her function. She was clear that her focus was her risk assessment and recommendations and that she is not part of law enforcement and, in my judgement, there is nothing in the 2018 Law which suggests otherwise.

The Defendant's case

33. Advocate Steel on behalf of the Defendant asked me to exercise my discretion under section 78 to exclude the evidence of the confession. He submitted that I should take into account the following factors:

1. the age of the Defendant. (I note that the Defendant was 17 at the time of the Commission of the offences and 18 and 3 months at the time of the making of the confession which, we learned from the Probation Officer, was on 18th June 2021);
2. that the Defendant is not a person who has experience of the criminal justice system and specifically with the Probation Service;
3. that the offence in respect of which the report was being prepared - a RIPL offence - is different in kind from the drugs offence about which the Defendant was questioned by the Probation Officer which was unfair and in contrast to the position in Elleray where the offences of indecent assault and rape are of a similar type;
4. that it was unfair that the Defendant was questioned at the interview with the Probation Officer about the drugs when the police investigation had concluded. Advocate Steel argued that the interview with the Probation Officer was a continuation of the police investigation and that the Defendant should have been cautioned and have had access to independent legal advice;
5. that neither the Probation Officer nor the Officer who read through the SER appreciated that the Defendant had confessed to a serious offence whereas in Elleray the Probation Officer was clear that another offence had been admitted;
6. that possession with intent to supply where the person to be supplied is the owner of the drugs is not an offence which is as readily identifiable as, for example, the offence of rape in the Elleray case;
7. that the Defendant was being interviewed in connection with a RIPL offence which carries a maximum sentence of two years whereas the offence which he admitted namely possession of a Class A substance with intent to supply carries a maximum sentence of life imprisonment with a starting point based on the Richards guidelines of seven to nine years;
8. that the Probation Officer had particularly noted the sentence in the Prosecution papers supplied to her that there was to be no further action in respect of the drugs;
9. that the Defendant and the Probation Officer discussed the surprise that there was to be no further action in respect of the drugs;
10. (and Advocate Steel considered this to be a point of particular relevance) that the Probation Officer gave evidence that, with the benefit of hindsight, it would have been a good idea to stop the interview when the Defendant first began to talk about the drugs so that he could take legal advice;
11. that, in this case, the recommendation of the Court of Appeal in Elleray that the interview be stopped and an opportunity given for legal advice is what should have happened. In practical terms, he suggested that a manager should have been called and perhaps a new Probation Officer appointed;
12. that there is a public interest in Defendants being able to be frank and honest with Probation Officers so that appropriate sentencing recommendations may be made to the Court and relevant rehabilitation work identified. These benefits would be jeopardised if the Court allowed the content of such discussions to be relied upon to secure conviction for an offence other than the subject of the SER. This would hinder the Probation Service from performing their important role in assisting the Court in determining correct sentences; and
13. in response to the Prosecution point about the inclusion of the confession in the SER for the sentencing of the Defendant for the RIPL, (see below) that either the SER could be redacted or the confession left in and the Jurats directed to sentence only on the RIPL as happens in cases where there is evidence of another offence on face

of papers. The Court sentences on the basis that criminality is being hidden in any event.

The Prosecution case

34. The Prosecution's case was as follows:

1. that the offence of possessing Class A drugs with intent to supply is so serious that it is in the public interest for the Prosecution to continue even though the evidence is from a conversation between the Defendant and a Probation Officer. It is acknowledged that such a circumstance will be rare;
2. that the Supply Offence is inextricably linked with the RIPL and that an interview of the Defendant for the RIPL offence was impossible without making reference to the circumstances under which the telephone was seized in a house in which drugs were found. The arrest of the Defendant in a house with drugs will be an aggravating factor in sentencing for the RIPL offence. If it was not reasonable for the Probation Officer to ask the question, she cannot do her job;
3. that, just as an offender must be free to discuss matters openly with an offender, a Probation Officer must be free to ask questions about the offence into which that Probation Officer is looking. These are two competing public interests;
4. that the discussion between the Defendant and the Probation Officer was not a continuation of the police investigation rather the confession was made unsolicited and of the Defendant's own volition. It was not an interview under the relevant provision of PPACE (which he later confirmed to be para C11.1 of the Codes of Practice to PPACE) ("Code C11.1") which triggered the protections for a suspect being questioned. It was acknowledged that the Probation Officer was asking questions about an offence but she did not suspect the commission of a further offence. The Probation Officer was not charged with the duty of investigating offences (by which I took him to refer to section 74(8) of PPACE). She is charged with the duty of investigating offenders. She is not part of law enforcement;
5. that in accordance with Elleray, the Probation Officer's duty to prepare a report which clearly and frankly set out the Probation Officers view including a risk assessment;
6. as said in para 12 of Elleray, there are no hard and fast rules as to what a Probation Officer or Court should do in the circumstances of a confession. The admissions in this case and in Elleray are important, serious, and relate to the offence being the subject of the report. It is too late to stop an interview once an offender has started to make an admission as it cannot be ignored. Excluding the confession would result in a situation in which a lot would be asked of a Probation Officer should a similar admission be made where there is no reason to anticipate or expect it;
7. that the exclusion of reference to the admission from the sentencing report in the RIPL would put the sentencing Court for the RIPL completely in the dark as to the reason for the withholding of the pass code and this would frustrate the public policy of the Court having full information before its sentences an offender. The Jurats would want to know why he had committed the offence;
8. the admission made by the Defendant was simple, frank, open and matured and there is nothing unfair on that admission being relied upon to found a Prosecution against the Defendant;
9. that it cannot be said what effect the statement that there would be no further action had on the Defendant because he did not give evidence. It was clear that the Probation Officer was aware of it and they were both surprised. It would be

speculation to say whether this loosened the Defendant's tongue. It was at the back of the Probation Officer's mind when she was asking the questions. Her believing that the drugs matter was done and dusted lends weight to the fact that she was only asking about the RIPL and that she had no interest in any other offences;

10. that the Defendant could have no expectation of confidentiality as he was told that the report would be shared with the Prosecution, Defence and Court; and
11. that, in all the circumstances, it is not unfair nor would it have such an adverse effect on the proceedings to admit the confession.

Consideration and Application of Legal Principles to the Facts

35. I consider the approach set out in the citation from the case of McDonald at paragraph 29 above to encompass perfectly my duty to see that a criminal trial is conducted fairly which involves balancing the interests of the Prosecution as well as the Defence.
36. Both counsel rely on Elleray. It must be remembered that the Elleray case is an appeal case and that the Court of Appeal was only entitled to interfere with the decision of the trial judge if the judge erred in law or the exercise his discretion was so unreasonable as to be perverse.
37. What the case illustrates is what Advocate Davies set out in his argument namely the competing, important public interests of the bringing to justice of those who have committed offences, particularly serious offences, and the public interest of offenders being frank with Probation Officers who are engaged in the important task of providing to the Court a comprehensive risk assessment and sentencing recommendation in respect of the offender.
38. I note that at paragraph 11 of Elleray his Lordship refers to the judgement given by Sir Charles McCullough in the case of R v Stokes, in which it is said that there can be no question of the evidence being automatically excluded because it consisted of an admission made to a Probation Officer. That is my starting point.
39. His Lordship indicates at paragraph 11 that the first consideration is that of the Prosecution in deciding whether it is in the public interest to proceed with the Prosecution. That stage has been passed in this case and I am not asked to review it so it is left to me to consider whether under section 78 whether to exclude the evidence. His Lordship, having said that it is appropriate to have in mind (which I have done) the contrast between the position that exists when an offender is interviewed by the police and that which exists when the offender is interviewed by a Probation Officer, sets out a number of factors to be considered which I will take in turn.

The need for frankness between the offender and the Probation Officer

40. I am required to have regard to the fact that the admission was made in the course of an interview with a Probation Officer and the impact of prosecutions based on admissions to Probation Officers in terms of potentially hampering Probation Officers in their important duty to assist the Court in performing the risk assessment and determining the correct sentence for offenders.

The fact that there may not be a reliable record of what was said

41. Fortunately, there is no issue in this case with the reliability of the Probation Officer's record of what was said. Her evidence was clear, open, candid and insightful.

That the Defendant was not cautioned and had no access to independent legal advice

42. Advocate Steel submitted that the Defendant should have benefited from the rights and entitlements he would have had during a police interview – caution and access to independent legal advice before answering questions which amounted to an interview in relation to the serious offence of possession with intent to supply Class A drugs. Advocate Davies robustly disputed that the discussion amounted to an interview in the sense that the Defendant’s right to those protections was engaged.
43. It is common ground that the discussion between the Probation Officer and the Defendant was an interview in the ordinary sense of that word namely in exchange of questions and answers. Advocate Davies submitted that there is a clear distinction between that “interview” and an interview for the purposes of PPACE and specifically Code C11.1 and section 74(8) of PPACE which would require a caution and an opportunity to access independent legal advice.
44. Based on the unchallenged evidence of the Probation Officer, I find that she went about the task of obtaining information from the Defendant in relation to his offending behaviour by asking open questions of him and that she did not specifically question him in relation to the drugs in the house with a view to eliciting any admission of other offending behaviour. It was common ground that he was not coerced in any way to give information or under any pressure. Her reading that there was to be no further action in respect of the drugs was very much in her mind when she was talking with the Defendant; she did not recognise that he had confessed to a very serious offence. Her focus was the RIPL.
45. Section 5 of the 2018 law clearly sets out the role of the Probation Officer in the context of criminal sentencing namely assessment of risk and formulation of recommendation as to sentencing recommendations. She was properly carrying out those duties. She was not “charged with investigation of offences” (section 74 of PPACE) and I am satisfied that the discussion with her did not amount to an interview under Code C11.1 such as to require the Defendant to be cautioned and given the opportunity to take independent legal advice before talking to her.
46. That said, I do not equate the discussion with the Probation Officer with a spontaneous confession to a third party. There was a level of enquiry of the Defendant about his offending as a result of which he made the confession. The Probation Officer attested to his openness which she found surprising in view of his no comment interview. The circumstances of the discussion in which the confession was obtained require careful analysis.
47. I turn to the issue of confidentiality which arose as a consequence of the Probation Officer’s explanation of what she said to the Defendant at the start of their meeting about confidentiality and who would have access to the information within the report. Advocate Davies disputed that any duty of confidentiality could arise. Advocate Steel did not argue that it did, so I do not have to determine the point. I do consider the discussion about confidentiality between the Probation Officer and the Defendant relevant to my review of the circumstances in which the confession was obtained. In this case the Probation Officer explained to the Defendant (and I note that that explanation was not challenged in cross examination) that what he was saying to her was confidential but that the report would be shown to the Prosecution, Defence and Court. The Probation Officer could not tell me what the Defendant understood from the discussion about confidentiality. As the Defendant did not give evidence, I simply do not know what impact that might have had on him and I will not speculate about that but equally I do not ignore it. Whilst it was made clear to the Defendant that what he told the Probation Officer would be seen by the Prosecution, Defence and Court, it cannot be assumed that he, being young and inexperienced in criminal proceedings, would understand that sight by the Prosecution could lead to a police investigation and a further prosecution against him.
48. I consider it relevant that when the Defendant was interviewed by the police under caution (which warns that what is said could be used in Court) and with the benefit of independent legal

advice, he answered no comment. I consider it reasonable to infer that, had he had the benefit of legal advice in relation to his discussion with the Probation Officer and the potential consequences of that discussion, he would not have made the admission. I simply do not know whether he realised that he had made a confession. I note that he raised no points on the report when it was read with him. His age and inexperience in terms of dealing with the Probation Service are relevant to his reaction to the report as is his understanding that there would be no further action.

49. I also consider it particularly relevant that the Probation Officer's approach to her discussions with the Defendant was influenced by the fact that a decision had been made to take no further action in relation to the drugs. She said this was in the back of her mind when she was talking with the Defendant and it was clear from her evidence that he was also aware of it during their conversation. She explained that they were both surprised about it.
50. In my judgement, Advocate Steel makes a valid point in observing that neither the Probation Officer (and I would add the reviewing Officer) considered the admission to raise any particular issues. The Probation Officer did not recognise at the time that it was a confession to such a serious offence. This appears to have been because she was influenced by her knowledge that there would be no further action. She was very candid in saying that it didn't cross her mind that there was an issue and I accept Advocate Steel's submission that it is relevant that she was not aware what had been admitted was a serious crime and that the reporting of that admission might lead to criminal proceedings.
51. Advocate Steel considered the Probation Officer's statement that, with hindsight, the interview should have been stopped to allow access to independent legal advice to be key. Whilst I note this candid observation from a very experienced Probation Officer and factor it into my decision as to the overall fairness of how the confession was obtained, it is not determinative.
52. I consider the uniqueness of the situation which has arisen in this case to be relevant to the issue of balancing the public interests. I note that this is so even in the context of RIPL offences where it could be viewed as more likely that admissions of other offences might be made.
53. I turn now to the Prosecution submission that it would have been impossible for the Probation Officer to interview the Defendant without making reference to the circumstances in which the telephone was seized. In my judgment this question is not directly relevant to the exclusion of the evidence. It is not the case that evidence of the confession can only be excluded if I find some fault with the questions posed by the Probation Officer or the way in which she dealt with the admission. My task is not to review the practice of the Probation Service but to analyse the circumstances in which the admission was made and assess the impact of those circumstances on the fairness of the trial.
54. I do not consider that any issue of what the Jurats are to be told about the admission when they come to sentence the Defendant for the RIPL is relevant to the application before me to exclude the confession as evidence in the Supply offence. As I indicated at the oral hearing, the Jurats are used to sentencing offenders for RIPL offences in circumstances where it is not known what the Defendant was trying to hide. The Jurats are entitled to "*proceed on the basis that the failure to provide access is motivated by a desire to hide something either to protect others involved in criminal activity or to conceal the accused's own more extensive criminality*". (See para 79 of Barras, Watt and Orchard.) The issue of how to deal with the admission in terms of sentencing for the RIPL will require separate consideration.

Decision

55. The Defendant has admitted the commission of a very serious offence. I have to decide whether, in all the circumstances, including the way in which the confession has come to be

made and balancing the important competing public interests in this case, the Prosecution's reliance upon the confession would impact on the fairness of the trial to the extent that I should exclude it.

56. There is no principle that an admission made to a Probation Officer should be excluded because it is made to a Probation Officer.

57. These are my conclusions:

1. that the Defendant has admitted a serious criminal offence and it is in the public interest generally that those who commit serious criminal offences should be brought to trial;
2. that there is a competing public interest namely that the admission of the confession made to a Probation Officer is likely to hamper the openness of offenders with Probation which in turn has the potential to compromise public safety by impacting negatively on risk assessments and also to deprive the sentencing Court of fully informed sentencing recommendations from the Probation Service;
3. that the situation in which a prosecution is based on a confession to a Probation Officer has not occurred before in Guernsey and is likely to occur again only rarely, if at all;
4. turning to the circumstances in which the confession was obtained:
 - a. that the very experienced Probation Officer's interaction with the Defendant was shaped by her having read that there was to be no further action in respect of the drugs. She was completely focussed on the RIPL and was not alive to the possibility of, or indeed the fact of, the Defendant's confession to a serious offence. The reviewer of the report also appears not to have realised the significance of what the Defendant said;
 - b. that the Defendant was barely 18 at the time of the confession and inexperienced in the criminal justice system and specifically with the Probation Service. When the Defendant was interviewed by police, he had the benefit of independent legal advice and answered no comment to all questions;
 - c. that, on the evidence of the Probation Officer, she shared with the Defendant that there would be no further action and they were both surprised. Whilst he did not give evidence as to impact on him of this information, the only reasonable conclusion is that it was bound to have played a part in his openness and I cannot rule out that the discussion about confidentiality also played a part;
 - d. that the Probation Officer was surprised at the Defendant's openness especially in view of his no comment interview;
 - e. that his being aware that there would be no further action in respect of the drugs, combined with his age and lack of experience and the lack of awareness of the Probation Officer of the potential issues created a unique environment, one in which there was a risk (unintentional) of unfairness to the Defendant;
5. that, in view of the circumstances in which the confession was obtained, the Prosecution's reliance upon it would impact on the fairness of the trial to the extent that I should exclude it;
6. that, noting that section 78 requires me to look at all the circumstances, and not only the circumstances in which the confession was obtained, in this case there are the

above competing public interests to be considered. Given the rare, if not unique, circumstances of this case, the balance of public interests tips in favour of exclusion to preserve the integrity of the risk assessments and sentence recommendations even though this means that the Defendant in this case will not face justice for his crime.

58. In my judgment, therefore, the admission of the confession as evidence would have such an adverse effect on the fairness of the proceedings that the Court ought not to admit it.
59. In the Elleray case the Court of Appeal declined to lay down guidance for Probation Officers as to what they should do in these circumstances. I follow that approach and I specifically make no criticism of what happened in this case. I have simply analysed the facts as presented to me.
60. I stress that my decision in this case is entirely fact specific. Any future applications will fall to be dealt with on a case-by-case basis.

Catherine Maureen Fooks
Judge of the Royal Court

17th February, 2022