The Defendant, seeking to exclude two of the three interviews that were conducted with him before he was charged with supplying a controlled drug to another contrary to section 3(3)(a) of the Misuse of Drugs (Bailiwick of Guernsey) Law, 1974, as amended.

[2021]GRC092

IN THE ROYAL COURT OF GUERNSEY

Between	**THE LAW OFFICERS OF THE CROWN**	**Prosecution**
	-v-	
	JASON LESLEY GAUVAIN	**Defendant**

Defence Application to Exclude Material

Before: Richard James McMahon Esq., Bailiff

Hearing date: 23rd August 2021

Judgment handed down: 27th August 2021

Advocate for the Prosecution: **Advocate C G Dunford**
Advocate for the Defendant: **Advocate C J Green**

Cases and materials referred to in the Judgment:-

The Misuse of Drugs (Bailiwick of Guernsey) Law, 2003
The Police Powers and Criminal Evidence (Bailiwick of Guernsey) Law, 2003
Law Officers of the Crown v Correia (unreported, 17 August 2015)
R v Aspinall [1999] 2 Cr App R 115
Law Officers of the Crown v Jehan (unreported, 12 November 2018)
R v Gill [2004] EWCA Crim 325
Archbold: Criminal Pleading, Evidence and Practice
R (CPS) v Wolverhampton Magistrates' Court [2009] EWHC 3467 (Admin)
R v Neil [1994] Crim LR 441

Introduction

1. The Defendant, Jason Gauvain, is seeking to exclude two of the three interviews that were conducted with him before he was charged with what is now the single Count he faces of supplying a controlled drug to another contrary to section 3(3)(a) of the Misuse of Drugs (Bailiwick of Guernsey) Law, 1974, as amended. There are two co-Defendants, one of whom has pleaded guilty and the other not guilty to a separate Count. The Count to which the Defendant has pleaded not guilty involves no one else.

2. Although Advocate Chris Green on behalf of the Defendant originally raised both section 76 and section 78 of the Police Powers and Criminal Evidence (Bailiwick of Guernsey) Law, 2003 ("PPACE") as the basis for seeking to exclude these interviews, he has since abandoned the former and so the application has proceeded solely on the basis of section 78. Subsection (1) provides that:

"*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.*"

3. This application to exclude evidence has proceeded by way of the usual *voir dire* (see, eg, the approach in *Law Officers of the Crown v Correia* (unreported, 17 August 2015) and other cases since). As it turned out, most of the evidence to be considered was agreed between the parties and there was a single witness who gave oral evidence, Dr Nuwan Galapatthie, a consultant forensic psychiatrist, on whose expert evidence the Defendant relies.

Brief facts

4. The case being advanced by the prosecution is that the Defendant was seen with a large object on 22 January 2020, which was passed to the co-Defendant who has pleaded guilty and which package was found to contain approximately 750 grams of cannabis resin. The addressee of that package was not the Defendant, but someone he says is a former resident at the premises where he was living at that time, but the package had been sent to the address at which the Defendant lived. Others live at that address, albeit in separate rooms, but with communal areas. Having been arrested on 22 January 2020, the Defendant was interviewed that evening. It is common ground that an appropriate adult should have been present but was not. This breach of Code of Practice C under PPACE is conceded by the prosecution. The second interview of the Defendant took place on 20 May 2020. On this occasion, an appropriate adult was present, but Advocate Green has spotted that the interviewing officer did not comply strictly with para. 11.17 of Code C. The third interview took place on 17 June 2020. This interview is not challenged but, subject to the outcome of the defence application to exclude the other interviews, it may need some editing. At my request at the conclusion of the hearing on Monday, I have been provided with a copy of that interview with what is liable to be edited out if the earlier interviews are excluded. It is helpful to see this because it shows the bare minimum of what will be adduced at the trial by way of interview evidence against the Defendant. The extent of editing required may differ if only the first interview were to be excluded, eg, passages on pages 5 and 12 would potentially survive. I will also point out that there remains a reference on page 2 to the Defendant still being under caution, from which there is an inference that this is the continuation of an interview process, and which might need further consideration in the event of the earlier interviews being excluded.

5. The evidence that has been agreed comprises principally three statements from the officers who performed the function of custody officer on the three occasions when the Defendant was at the police station. The custody record in respect of him has been produced. There is a further statement and some other documents from the Force Medical Examiner ("FME") who attended on 22 January 2020, Dr Downing. In each case, these statements have been prepared some time after the events, so the primary evidence is taken from contemporaneous notes, including the custody record. Dr Galappathie has prepared a report dated 14 March 2021. Finally, there are some agreed admissions signed by both Advocates on 23 August 2021 relating to the role of the appropriate adult at the second interview.

6. PS Donnelly was the custody officer on 22 January 2020 when the Defendant was brought in, following his arrest, by another officer. Having authorised his detention, this officer opened the custody record. During the early stages of the Defendant being at the police station, PS Donnelly was told by him that he is a type 1 diabetic and has a diagnosis of schizophrenia. He responded "no" when asked if he was suffering from any mental health problems. PS Donnelly contacted the FME and asked him to attend because the Defendant had stated he is diabetic and had not had his insulin, which the officer considered was a potentially dangerous situation. The

Defendant had told the officer that his medication for his schizophrenia was not overdue. The officer says the Defendant "*did not present to me as in any way mentally vulnerable or incapable of understanding what was happening and it was my honest belief that he did not require an appropriate adult when I spoke with him.*"

7. Dr Downing's evidence confirms that he attended within a short time after the Defendant was detained. The Defendant's insulin was obtained from his home address and a first dose of his medication was taken early that afternoon. A second dose was administered later that afternoon, and shortly before the first interview of the Defendant took place. Dr Downing states that there were no risks or concerns with regard to the Defendant's mental state arising from the custody officer's review and he considered that the Defendant "*was showing no signs of being mentally disturbed*" adding that, because of the way the Defendant "*behaved and interacted with me and indicated no current evidence of any mental disorder, I came to the conclusion that he was fit to interview*". He points out that he was not asked to assess if the Defendant should have an appropriate adult, although he also states that "*had I thought he was needing an appropriate adult, I would have conveyed this message to the Custody Sergeant.*"

8. The Defendant was interviewed on 22 January 2020 from 6.11 pm until 7.05 pm. As already stated, there was no appropriate adult present. The Defendant confirmed that he had agreed to be interviewed without a lawyer present. I have had the benefit of listening to the audio recording of this interview. At the same time, Dr Galappathie also listened to it. I heard that the Defendant's voice was raised at times. He became more excitable, particularly when giving longer explanations. During the course of this interview, the Defendant denied being the person who had been seen in the vicinity of the Odeon car park earlier that day carrying a package, being the box in bin sacks subsequently located after being thrown by the co-Defendant, although he accepted he had followed the route taken to get to Horizons, near the fire station, but denied carrying any package.

9. Dr Galappathie acknowledged that he had prepared his report as a result of considering the Defendant's extensive medical records, reading the transcript of the interview and a discussion with the Defendant over a video-call. He agreed, when asked, that he had not seen the Defendant as he presented on 22 January 2020, unlike Dr Downing. He approved the way in which the diagnosis of the Defendant's condition had become a schizoaffective disorder rather than schizophrenia. As shown at para. 43 of his report, he recognised that Dr Flambert had seen the Defendant just a week earlier than when he was arrested and interviewed and she had recorded him as being "*stable without any signs of mania or psychosis*", which he considered meant the Defendant had been in remission at that time. However, he distinguished between being in remission and still having residual symptoms, where there are risks of relapsing if placed under stress. He accepted that the Defendant did not appear to have suffered any relapse following this interview.

10. Dr Galappathie identifies a number of instances during the interview when the Defendant demonstrated thought disorder. He highlighted that the interviewing officer had commented fairly early on to the Defendant that the Defendant was getting agitated and needed to stay calm, but without apparently considering breaking the interview at that point to assist. In his opinion, the occasions he has identified are those where he would expect an appropriate adult present to intervene. Although Dr Galappathie had referred to a comment on page 18 of the transcript as showing the Defendant wanted to go into a cell and strangle himself, having heard the recording of the interview, he accepted that this was a comment about an item of clothing having been taken away from the Defendant and so did not amount to the Defendant displaying any suicidal intentions. As such, this example was of less concern to him now.

11. When he was questioned by Advocate Dunford, he agreed that the Defendant had the capacity to choose whether to ask for a lawyer to be present. He pointed out, repeating what is in his

report, that one of the functions of an appropriate adult, though, is to assist a suspect being interviewed in that regard. He did not accept that his report and his answers to questions showed that he was sympathetic to the Defendant's plight. He explained that he was offering an objective assessment from the material he had read which was based on his experience.

12. Because Dr Galappathie's evidence focused on the first interview, I can state at this point that my impression of his evidence was a favourable one. I found his answers to be measured and noted that, when asked whether he agreed with how Advocate Dunford put certain aspects of the situation to him, he readily agreed with what was being put, except when he felt unable to do so. The prime example of that was his response to being questioned about his sympathies for the Defendant. In relation to a specific area on which he was pressed by Advocate Dunford, being para. 89 of his report, he accepted that the question of overall fairness is one for the Court, but he considered that it was permissible for him to opine on that ultimate question because he might have been asked for his view and he felt it would be helpful to respond to the question his instructing Advocate had put to him. His response was borne out of his overall experience and I am persuaded that I should not simply disregard it but instead consider the matter from my own perspective, whilst recognising that Dr Galappathie's view is a factor I can take into account. In general, I found Dr Galappathie's report and his oral evidence helpful, although it may not have as much bearing on the outcome of the application as would have been the case if the breach of Code C remained in issue rather than being conceded. In particular, I have borne in mind what Dr Galappathie has had to say about his experience of dealing with such vulnerable persons and how the role of an appropriate adult affords additional safeguards that such persons really need.

13. Returning to the chronology of events, when the Defendant was interviewed on 20 May 2020, Jenny Murphy was present as an appropriate adult for the Defendant. The admissions in respect of her role establish that she had prior experience as a foster carer and a lead safeguarder for the Sports Commission, from which it is accepted she had much previous experience of dealing with vulnerable children and adults. She did not receive any specific training for the role of an appropriate adult, but had spoken about it with the Guernsey Border Agency before she attended an interview. She was given a reminder about the role each time she attended to perform this role. When she attended to assist the Defendant, this was not the first occasion she had been an appropriate adult. She was aware that she could ask for legal advice to be provided to the Defendant. Because of the passage of time, she could not be certain why this did not happen, but the Defendant did not want a lawyer and she did not insist on one being called. She no longer carries out the role of appropriate adult.

14. The custody officer on 20 May 2020 was PS Walker. As well as identifying that there is probably an error on the Defendant's custody record, which is unfortunate but has no bearing on the issues raised by the Defendant's current application, the officer explains that he recalls Jenny Murphy arriving at the time the Defendant was due to answer his bail because this had previously been arranged by Guernsey Border Agency staff. He adds "*I believe from memory that this was at my earlier instruction to them over the phone which having knowledge of Mr Gauvain would have been a requirement of mine for his time in police detention.*"

15. Once again, I have had the benefit of listening to this second interview. It is notable that the appropriate adult did not have cause to intervene at all during it on behalf of the Defendant. The Defendant gave a different account this time as to his involvement with the package. He agreed that it had been delivered to his home address and that there had been some contact by telephone with the co-Defendant to whom he had passed it. He was expecting it to be a delivery of shoes, but the package was larger and heavier and he had discovered what it was by looking inside it. He put the bin sacks over it to assist with carrying it. He had been asked to take it to Beau Sejour but agreed that it should be taken only as far as the Odeon car park. It was put to him that he had been lying in his first interview. Whilst listening to this interview, I felt that the Defendant

came across as being less agitated or excitable than in the first interview. There were occasions on which he raised his voice, but they struck me as being fewer. Again, some of those instances happened when the Defendant was giving longer explanations.

16. Finally, as regards the third interview on 17 June 2020, the custody officer was PS Gilman, who explains he was also aware from having dealt with the Defendant before that "*he suffered with mental health issues*", which was why it was no surprise that an appropriate adult also attended. During the course of this interview, the appropriate adult did not have cause to intervene on behalf of the Defendant and there was no lawyer present.

Legal principles

17. Both Advocates accept that the applicable principles for a challenge under section 78 of PPACE are well-established. As in the *Correia* case (*supra*), and by reference to the summary given in Professor Zander's work on the equivalent legislation in England and Wales, the Court is considering whether there has been a breach of the rules, particularly as found in the Codes of Practice, or some other impropriety, where that breach is significant and substantial, and which significant and substantial breach affects the proceedings unfairly from the defence standpoint and finally where that unfairness is so great as to require the evidence in question to be excluded.

18. I have further reminded myself that the burden lies on the prosecution to the criminal standard.

19. On behalf of the Defendant, Advocate Green has relied heavily on *R v Aspinall* [1999] 2 Cr App R 115. This case was an appeal against conviction. The appellant informed the custody officer that he suffered from schizophrenia. At trial, the Recorder had rejected a submission that evidence of an interview conducted without an appropriate adult being present be excluded under the equivalent of section 78 of PPACE. The Recorder recognised that there had been a breach of the equivalent code of practice, but concluded that the apparently lucid state of the appellant, which rendered him fit to be detained and interviewed, negatived the requirements for the safeguard of an appropriate adult being made available. This appeal was allowed. Advocate Green, with some justification, points out that the situation of the Defendant in the present case is very similar.

20. When giving the judgment of the Court of Appeal, Bracewell J explained (at page 121):

> "*This Court is satisfied that the appellant should have had an appropriate adult with him at the police station in order to provide the protection, and to discharge the duties set out in the Code of Practice. The absence of any appropriate adult constitutes a clear breach of the Code. The custody officer knew of the appellant's mental disorder, but because he formed the view that the appellant was fit to be detained, he took no step to comply with the Code of Practice. Further he failed to inform Inspector Wright, and the interviewing officers, of the appellant's mental condition. This court has concluded that the breach of the Code of Practice was fundamental in affecting the fairness of the evidence which the Recorder ruled could be adduced. The extensive duties placed on an appropriate adult, and the reasons set out in the notes of guidance, demonstrate that significance of the role of an appropriate adult in respect of a vulnerable person whose condition renders him liable to provide information which is unreliable, misleading or self incriminating.*
>
> *The interview with the police officers was conducted without the benefit of legal advice, or the presence of a solicitor. In our judgment, this fact compounded the unfairness arising from the breach of the Code of Practice. Not only was this mentally disordered appellant deprived of the assistance, guidance, and protection of an appropriate adult, but was also without any legal advice, apart from the brief conversation with a duty*

solicitor over the telephone many hours previously. Inspector Wright in the absence of knowledge of the appellant's condition, carried out the procedure for recording the appellant's change of mind from requesting a solicitor, to being willing to be interviewed in the absence of a solicitor. However a vulnerable person who has been in custody for some 13 hours, and who is more likely to be stressed than a normal person, cannot be equated with a person lacking any disability, when expressing a wish to go home to his partner and child. A significant part of the duty of an appropriate adult, is to advise about the presence of a solicitor at interview, and this appellant was deprived of such advice which in all likelihood would have urged him to have legal representation. …

The interview contained some lies as subsequently admitted by the appellant, and in various respects the answers given did not accord with the evidence of the appellant at trial. Assuming the account given at trial was the truth, an appropriate adult or legal adviser could have been expected to advise him to tell the truth at interview.

If he had done that, his answers would have assisted the defence and not the police in denying, e.g. that others were present. He was plainly lying in that the police had already detained his co-defendant who was linked by evidence to the appellant's car. He thought he was assisting his case, but the appropriate adult or legal adviser would have urged him to tell the truth, because patent lies could only harm his defence. The appellant's credibility was undermined by his lies, which was essentially unfair, not by reason of malice or pressure, but by lack of safeguards to which he was entitled by reason of his disability. A vulnerable person may not be able to judge what is in his best interests, and that is the essential reason why Parliament enacted safeguards in the Police and Criminal Evidence Act 1984. In our judgment the exercise of discretion by the Recorder was fundamentally flawed in his ruling under section 78. It is not every breach that will lead to exclusion of evidence, but in this appeal we have concluded that the breaches were so fundamental that the interview should have been excluded under section 78."

The court proceeded to identify eight particular areas where the Recorder fell into error. They included that he had asked himself the wrong question, because it was not whether the appellant's condition on that day obviated the need for an appropriate adult to be present. It was further suggested that the Recorder failed adequately to address the wide range of duties, and the reasons for them being laid on the appropriate adult and he had not gone on to consider how the appropriate adult might have been expected to advise and assist this appellant.

21. This case of *Aspinall* has been referred to previously in this Court, particularly in *Law Officers of the Crown v Jehan* (unreported, 12 November 2018). At para. 4, it was further explained:

> "*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.*"

The reason why in the *Jehan* case "*mental illness*" is highlighted is that the case concerned a defendant who was mentally vulnerable and not, as here, someone with a mental disorder. A different outcome was reached about excluding the evidence. The judgment continues, by reference to the propositions found in *R v Gill* [2004] EWCA Crim 325, which relate equally to applications to exclude under section 76 or section 78, with the summary found in the fourth one being:

"*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?*"

22. Advocate Dunford has pointed to the summary of principles contained in *Archbold: Criminal Pleading, Evidence and Practice* (at para. 15A-11):

> "*General principles which still apply can be derived from two early Court of Appeal cases which dealt with breaches of the codes – Absolam (1989) 88 Cr. App. R. 332, and Delaney (1989) 88 Cr. App. R. 338. They are as follows:*
>
> *(a) a breach of a code does not lead automatically to exclusion (Delaney);*
>
> *(b) where there is a breach, the judge has a discretion to exclude the evidence (Absolam / Delaney);*
>
> *(c) the breach must be significant and substantial, and the more so, the more likely the judge is to exclude the evidence (Absolam);*
>
> *(d) bad faith/flagrant disregard of the codes' provisions will make exclusion more likely (Delaney);*
>
> *(e) the test to be applied is the s. 78 test (Grannell (1990) 90 Cr. App. R. 149, CA);*
>
> *(f) in applying the test, the judge should have regard to the rationale of the provisions of the code (e.g. Code D is generally designed to ensure that identification procedures provide a fair test of ability to identify) and the extent to which the breach is likely to defeat that rationale (Delaney);*
>
> *(g) if there is a breach but the judge admits the evidence, reasons should be given: Allen [1995] Crim.L.R. 643, CA;*
>
> *(h) if the evidence is allowed in despite the breach, the judge should explain the significance to the jury, as it may go to the weight attached to the evidence (see Graham [1994] Crim.L.R. 212, CA, and Quinn § 14-58).*"

He submits that the Jurats are accustomed to receiving evidence and being directed in respect of it appropriately by the presiding judge. In that regard, there is a difference between the approach taken when dealing with experienced Jurats as opposed to a lay jury. This should be factored in to the consideration of how readily the breach can be accommodated. In the present case, the reason the prosecution wishes to rely on the first interview with the Defendant is because he has lied. This goes to his credibility. It can be dealt with appropriately by a form of *Lucas*-direction. The concept of admitting evidence being challenged because it can be covered by a suitable direction to the Jurats has been recognised in a further decision of the Court from March 2020.

23. By reference to that same summary, Advocate Green has highlighted principle (f). He points out that the underlying rationale was dealt with robustly in the *Aspinall* case.

24. Advocate Dunford has also referred to the summary in para. 15-495 of *Archbold*, containing a number of key features. Among them is the reminder that each case has to be decided on its own facts. At point (f), there is the explanation that:

"*There are two stages in the application of s.78: first, the circumstances in which the evidence came to be obtained; secondly, whether admission of the evidence would have an adverse effect upon the fairness of the proceedings. In considering fairness, a balance has to be struck between that which is fair to the prosecution and that which is fair to the defence (see Hughes [1988] Crim.L.R. 519, CA). The final aspect of the fairness test appears to relate only to the defendant: whether 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". In Loosely (§§ 15-493, 15-539 and following), Lord Nicholls said (at [11]-[12]) that the concept of fairness was not limited to procedural fairness and Lord Scott added (at [122]) that evidence could be excluded because it had been obtained by unfair means.*"

25. When considering this balance of fairness, it is important to bear in mind what happens if the evidence is ruled inadmissible, which will deprive the prosecution of the opportunity of challenging the Defendant on what he said in that interview, potentially resulting in the Court forming a skewed impression of him, because there would only be part of the picture of the investigative process or admitting the evidence, enabling the Jurats to decide the extent to which the Defendant explains why it appears he deliberately chose to lie at that time. In doing so, the Jurats would be able to consider whether what was said at that interview arose from the Defendant's medical condition or the content of that interview was because he deliberately lied to try to escape responsibility.

26. At item (g) in this *Archbold* summary, there is a reference to the fact that section 78 "*should not be used to punish the police for inadequately training their officers*", the authority for which is *R (CPS) v Wolverhampton Magistrates' Court* [2009] EWHC 3467 (Admin).

27. The starting point in Code of Practice C is para. 1.6, which provides:

> "*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, in the absence of clear evidence to dispel that suspicion, the person shall be treated as such for the purposes of this Code.*"

This paragraph cross-refers to Note 1G:

> "*'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. 'Mental disorder' means any mental illness, arrested or incomplete development, psychopathic disorder and any other disorder or disability of mind. When the custody officer has any doubt about the mental state or capacity of a detainee, that detainee should be treated as mentally vulnerable and an appropriate adult called.*"

28. By para. 1.9(b), in respect of a person who is mentally disordered (or mentally vulnerable), the term "appropriate adult" is defined as:

> "*(i) a relative, guardian or other person responsible for their care or custody;*
>
> *(ii) someone experienced in dealing with mentally disordered or mentally vulnerable people but who is not an officer or employed by the police or customs;*
>
> *(iii) failing these, some other responsible adult aged 18 or over who is not an officer or employed by the police or customs.*"

29. The cross-reference to Note 1D adds the explanation that:

> "*In the case of people who are mentally disordered or otherwise mentally vulnerable, it may be more satisfactory if the appropriate adult is someone experienced or trained in their care rather than a relative lacking such qualifications. But if the detainee prefers a relative to a better qualified stranger or objects to a particular person their wishes should, if practicable, be respected.*"

30. By virtue of para. 3.5(c)(ii), the custody officer is required to consider whether a detainee requires an appropriate adult. Paragraph 3.13 covers *inter alia* a detainee who is mentally disordered and requires the custody officer, as soon as practicable, to inform the appropriate adult of the grounds for the person's detention and their whereabouts and to ask the adult to come to the police station to see the detainee. Paragraph 3.15 provides:

> "*If the appropriate adult is already at the police station, the provisions of paragraphs 3.1 to 3.5 must be complied with in the appropriate adult's presence. If the appropriate adult is not at the station when these provisions are complied with, they must be complied with again in the presence of the appropriate adult when they arrive.*"

There are further safeguards set out immediately thereafter, because the detainee shall be advised that the appropriate adult is there to assist and advise him, and that he can consult privately with the appropriate adult at any time (para. 3.16) and, if the detainee, or appropriate adult on the detainee's behalf, asks for an Advocate to be called to give legal advice, the provisions of Section 6 apply (para. 3.17).

31. Turning next to the interview process, para. 12.3 ends with the following sentence: "*Vulnerable suspects listed in Annex C shall be treated with special care, and these persons may not be interviewed except as permitted by paragraph 11.2 and Annex C.*" In both of those cases, there are exceptions where there is an urgency to conduct the interview. Similarly, in para. 11.15 there is a requirement not to interview a person who is mentally disordered in the absence of an appropriate adult unless para. 11.2 or Annex C applies. There is no suggestion in relation to the Defendant's first interview that any such situation arose warranting proceeding without calling an appropriate adult to attend. Note C1 explains that the provisions of Annex C override the safeguards designed to protect the persons otherwise covered by them and to minimise the risk of interviews producing unreliable evidence, adding that they should only be applied in exceptional cases of need.

32. Paragraph 11.17 provides:

> "*If an appropriate adult is present at an interview, they shall be informed they are not expected to act simply as an observer; and that the purpose of their presence is to:*
>
> - *advise the person being interviewed;*
> - *observe whether the interview is being conducted properly and fairly;*
> - *facilitate communication with the person being interviewed.*"

The first interview

33. On the basis of the concession by the prosecution that there has been a breach of Code of Practice C, the first consideration for the Court is just how significant and substantial that breach was.

This is because the more serious the breach the more likely it is that the evidence obtained will be excluded.

34. There is no suggestion that bad faith has been involved. However, I do find that there has been flagrant disregard of the provisions of the Code relating to making use of an appropriate adult. From PS Donnelly's evidence, it seems that it never even crossed his mind that he was dealing with a mentally disordered detainee. That was not helped by the approach described by Dr Downing, who refers to there being no concerns about the Defendant's mental health. This was not a case of trying to assess whether an appropriate adult was required because, as soon as the officer has been told in good faith, or has any suspicion, which I consider clearly applies once the officer was told of the diagnosis of schizophrenia, the appropriate adult regime must be followed. There is no discretion in respect of that because it is automatic. I find that both PS Donnelly and Dr Downing did not address their minds to the right question and so the Defendant was not afforded the level of protection to which he was entitled.

35. I take the view that the position is exacerbated by the fact that both of the custody officer's dealing with the Defendant when he returned to answer his bail and face further interviews make it clear that the appropriate adult regime had to be followed. Indeed, the inference I feel able to draw from PS Walker's evidence is that it had been realised between the Defendant's arrest and his return on 20 May 2020 that it was necessary to contact an appropriate adult to assist. In those circumstances, it must have been known to those involved with the Defendant that there had been a serious failure on 22 January 2020 to have proceeded without an appropriate adult present. Consequently, some plan should have been in place recognising the inadequacy of what happened in January. I do not accept Advocate Dunford's submissions that this was not in the most serious category of Code breaches.

36. Admitting that first interview into evidence will, in my opinion, be regarded from the defence standpoint as being unfair. There was an entitlement to have an appropriate adult called to assist the Defendant. As a result of being deprived of the appropriate adult that was required, the Defendant has responded in interview in a manner that will be detrimental to him. That is because it is apparent from the change of story subsequently about the events that day that he runs the risk of having his credibility attacked. That inevitably places him in a worse position than if this had happened with an appropriate adult present.

37. The Defendant chose to be interviewed without a lawyer present and that is something that might not have happened had an appropriate adult been called. I recognise that, when an appropriate adult was present at the second and third interviews, they still took place without the Defendant or either of the appropriate adults requesting that a lawyer attend. To that extent, there is greater weight in the suggestion that the absence of the appropriate adult effectively made no difference. However, I find myself in a similar position to that set out in the ***Aspinall*** case because I am troubled that the safeguards to which this Defendant was entitled have been completely overlooked. Had those safeguards been followed, the position may have been different and so the prosecution cannot discharge the high burden placed upon it. The lack of the safeguards to which the Defendant was entitled by reason of his mental disorder, however he was presenting at that time, mean that I find it would be unfair if his credibility were capable of being undermined by reason of the lies he told when deprived of those safeguards.

38. I have given very careful consideration to Advocate Dunford's submission that this is, like in some previous cases, a situation that can be managed through appropriate directions to the Jurats. Whilst this is quite finely balanced, I have concluded that the fairest way of dealing with the Defendant's case will be to exclude this first interview. The Defendant's account is one that may or may not be believed by the Jurats. He will be entitled to have them consider that account and it can be tested in the event that he gives evidence. If the first interview were also admitted into evidence, I take the view that this will increase the onus on the Defendant at his trial. It

should be remembered, adopting the language of Code C, that he remains a mentally disordered person. As a result, the trial process will be more stressful for him than if he were not mentally disordered. I have taken this factor into account in deciding that the unfairness of permitting this first interview to be relied upon by the prosecution is so great that this evidence should be excluded. Because the Defendant was deprived of the important safeguards to which he was entitled under Code C on being first detained and then interviewed later that day, I am satisfied to the extent I need to be on the basis of the prosecution's burden, that it would be unfair for him at trial to have to explain the reasons why he gave this account on that day. Further, in the context of overall fairness, I am persuaded that this issue would amount to an unnecessary and unhelpful distraction for the Jurats because they would then be required to weigh in the balance how far this account affects the Defendant's credibility and it is less appropriate for them to have to consider what the effects of there not being an appropriate adult are in all these circumstances.

39. For these reasons, I will rule that the prosecution is not permitted to rely on this first interview.

The second interview

40. The breach of Code C on which the Defendant relies to exclude the whole of the second interview is non-compliance with para. 11.17. It is notable that the way this was dealt with in the third interview is accepted to have been compliant:

> "*... you're acting as an Appropriate Adult OK so you are not expected to simply – you are not expected to act simply as an observer and the purpose of your presence is to first advise the person being questioned and observe whether or not the interview is being conducted fairly and secondly to facilitate communication with the person being interviewed do you understand that?*"

This uses the wording found in para. 11.17. Whereas at the start of the second interview, the officer conducting the interview noted that the Defendant had got an appropriate adult with him that day, then said "*if you need to speak with her at any point or anything like that okay she's here to assist you ... she not here just to watch the interview ... If you feel at any point that umm you need some extra help or anything then obviously she can also request that you maybe have an Advocate as well*". The appropriate adult was then asked if she understood and she indicated she did.

41. Whilst it has to be acknowledged that the words used in the second interview did not comply with what is required by para. 11.17 of Code C, what was said openly in the interview did partly comply because the interviewing officer did explain in the presence of both the Defendant and the appropriate adult that the appropriate adult was there to assist and not just to observe. He did not mention, though, about her role in ensuring the interview is being conducted properly and fairly or about facilitating communication. Accordingly, when it comes to deciding how significant and substantial this breach is, I am satisfied that it falls at the lower end. In reaching that conclusion, I have noted that there was no need for the appropriate adults who assisted the Defendant to play any part in actually facilitating communication. I am satisfied from the admissions that the appropriate adult at the second interview knew what was expected of her although it would obviously have been preferable had this been stated explicitly in the presence of the Defendant at the start of the interview.

42. What is perhaps less clear is what the Defendant understood the role of an appropriate adult to be. However, it was open to the Defendant to have been called to give evidence as to what he had been told about this and he did not do so. In those circumstances, I proceed on the basis that he knew what the appropriate adult's role was, even if that had not been explained to him, as required, in the interview itself.

43. Because this is not as significant and substantial a breach as the total absence of an appropriate adult at the first interview, it is difficult to see why the second interview, suitably edited to remove references to the first interview, now excluded, should not be admitted into evidence and relied on by the prosecution. On this occasion, the Defendant had the benefit of an appropriate adult being present. She did not see fit to intervene at all. Although this is slightly surprising given the way that interview began, with the officer putting to the Defendant that account he gave previously and pointing out that he had been lying to him, it follows from the way that interview was conducted that the appropriate adult did not raise any concerns about the conduct of that interview. She did not feel the need to request that an Advocate be approached for advice. The same thing happened at the unchallenged third interview. Although Advocate Green indicated that if he had been called to assist the Defendant certain advice would have been tendered to him that might have resulted in a different approach being taken, I am not persuaded that the interviewing officer missing out some of the words he should have used at the start of the second interview results in a level of unfairness to the Defendant that means the whole of the second interview needs to be excluded. Because the role of the appropriate adult has been covered by admissions, I am prepared to infer that the background to the first interview must have been known to the appropriate adult at the time of the second interview

44. Ultimately, there is a further balancing exercise that needs to be undertaken. Advocate Green has noted the passages in this second interview where questions were put to the Defendant arising out of the first interview. All of those sections necessarily have to be edited out once the whole of the first interview has been excluded. Once this is done, I am satisfied that what remains produces a fair outcome for the prosecution and the Defendant. His account at this second interview is broadly consistent with what he says in the third interview. I think the interviewing officer should have realised that the content of the first interview was something that might be challenged because of the glaring absence of an appropriate adult and so should have tailored the second interview in light of that knowledge. Having realised that an appropriate adult was being made available to the Defendant on this occasion, he and others really should have addressed their minds to the increased likelihood that the first interview was at considerable risk of being excluded. Because this was the occasion on which the Defendant accepted a certain level of involvement in what took place, I take the view that it will be preferable for this second interview, as edited, to be capable of being relied on by the parties if that is their wish, so it will not be excluded in its entirety under section 78 of PPACE.

45. In reaching that conclusion, I have had regard to ***R v Neil*** [1994] Crim LR 441, to which Advocate Green drew attention. The headnote sets out that:

> "*… where there is a series of two or more interviews and the court excludes one on the grounds of unfairness, the question whether a later interview which is itself unobjectionable should also be excluded is a matter of fact and degree. This is the principle that can be deducted from the authorities (Carnali, Gillard and Barratt, Y v. D.P.P. and Glaves). It is likely to depend on a consideration of whether the objections leading to the exclusion of the first interview were of a fundamental and continuing nature, and, if so, if the arrangements for the subsequent interview gave the accused a sufficient opportunity to exercise an informed and independent choice as to whether he should repeat or retract what he said in the excluded interview or say nothing.*"

46. Although the commentary refers to the appellant in that case not having the opportunity to take legal advice so that he might have been uncertain about the extent to which a change of story or a lapse into silence might have counted against him later, I am not persuaded that the question of fairness is affected to the same degree in the present case where the fundamental breach on 22 January 2020 was the absence of the appropriate adult and by 20 May 2020 an appropriate adult was present and understood what her role was meant to be. It may be strange that she did not intervene, and the same might even be said about the third interview, and it makes me wonder

whether sufficient explanation and even training is being given for those undertaking these roles, but the fact of presence means that the safeguards that are designed to be afforded to a vulnerable detainee, such as this Defendant, were being given. In other words, balancing fairness between the parties, the process in relation to this second interview was sufficiently compliant not to exclude it and this has remedied the fundamental breach found in relation to the first interview. If appropriate, because it was the same officer who conducted the interviews, he can be asked about why he did not comply strictly with para. 11.17 of Code C, after which the Jurats can assess the weight to be given to the Defendant's responses.

47. For these reasons, I will not exclude the entirety of the second interview, but it must be edited in such a way that it removes all reference to there having been a first interview, which is effectively to be treated now as not having taken place.

Conclusion

48. For the reasons I have given, the Defendant's Application is partly successful. The absence of an appropriate adult in the circumstances of the Defendant's detention and interview on 22 January 2020 is, in my view, such a significant and substantial breach of Code C that the evidence obtained from it should be excluded as potentially being unreliable. Although the prosecution will lose the ability to highlight the lies apparently being told at that time, the unfairness to the Defendant is so great that I am satisfied that it should be excluded. It is impossible to do anything other than speculate as to what might have happened had an appropriate adult been called and had the opportunity to run through what is set out in Section 3 of that Code. However, despite the minor breach of the Code in relation to the second interview, I am not persuaded that it would be right to exclude it in its entirety. The Defendant had the benefit of the safeguards to be afforded to him at this interview, so the breach is not particularly significant and substantial and so I exercise my discretion against excluding it for the reasons I have explained. However, the edits proposed by Advocate Green now need to be considered by the prosecution and agreement reached as to what can be adduced at the Defendant's trial. There will also be some consequential; editing of the third interview.