

JERSEY / JUDGMENT

AG -v- Da Silva [2007] JRC 217 (21 November 2007)

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[2007] JRC 217 [New search] [Help] [2007]JRC217 ROYAL COURT (Samedi Division) st November 2007 Before : J. A. Clyde-Smith, Esq., Commissioner, sitting alone. The Attorney General - v- Duarte Nuno Gomes Da Silva S. Baker, Esq., Crown Advocate. Advocate H. J. Heath for the Defendant. JUDGMENT on legal argument THE commissioner: 1. The Defendant applies to have certain admissions given in his interview with the police excluded for the purpose of his sentencing. 2. The Defendant has pleaded guilty to one count of supplying heroin between the 1 st March, 2006, and 14 th February, 2007. The Crown seek to have the Defendant sentenced on the basis of his admissions, given in interview, that he supplied heroin 2 or 3 times a week over a year in amounts totalling some 100 grams. If the admissions are excluded the Defendant stands to be sentenced on the basis of a much shorter period, not as yet entirely clear, and probably involving some 7½ grams of heroin in total, very substantially reducing the starting point set out in the sentencing guidelines. 3. The application is made under Article 76 of the Police Procedures and Criminal Evidence (Jersey) Law 2003 ("PACE") which is in the following terms:- "...in any proceedings a 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 so adversely effect the fairness of the proceedings that the Court ought not to admit it." The Defendant does not rely on Article 74 of PACE dealing with the admissibility of confessions and there is therefore no allegation that the admissions given at interview were obtained by oppression or in consequence of anything said or done which was likely to render them unreliable. 4. Miss Heath, for the Defendant, has broken down the number of interviews into four. The first interview was held on the 19 th April, 2007, from 1126 hours to 1209 hours. The second interview was held on the same day from 1445 hours until the tape ended prematurely and was immediately followed by the third interview from 1530 hours to 1545 hours. It was in this interview that the admissions were

made following which the Defendant was charged. The fourth interview took place on the 20 th April, 2007 from 1530 hours to 1546 hours. All of the interviews were conducted through an interpreter. 5. Miss Heath alleges that there were a number of breaches of the Police Procedure and Criminal Evidence (Codes of Practice) (Jersey) Order 2004 ("Codes of Practice") some of which she conceded were minor or technical but she submitted, relying on the case of R v Hussain

[2005] EWCA Crim 31 , that all of the breaches need to be considered as a whole and I accept that proposition. I take the alleged breaches in turn. 6. As can be seen later, I do regard the second and third interviews as being one interview interrupted only by the replacement of the tape, but at the commencement of the first interview the Defendant was cautioned in the following terms:- "You are not obliged to say anything unless you wish to do so, but what you say will be recorded and will be used as evidence against you" (my emphasis). At the beginning of the second interview the Defendant was cautioned in the following terms:- "I must remind you that you're not obliged to say anything unless you wish to do so, but what you do say will be given in evidence" (my emphasis). At the commencement of the fourth interview a caution was given in the same terms as that used in the first interview. Section 10.2 of the Codes of Practice requires the caution to be in the following terms:- "You are not obliged to say anything unless you wish to do so, but what you say may be put into writing and given in evidence" (my emphasis). 7. No point was taken as the caution stating that anything "you say will be recorded" , when it was manifest that the interview was being recorded, but exception is taken to the reference to the fact that "what you say will be given in evidence." Miss Heath submitted that this contravened Section 12.3 of the Codes of Practice which provides that:- "No police officer ... shall indicate, except in answer to a direct question, what action will be taken on the part of the police if the person being interviewed answers questions, makes a statement, or refuses to do either." She argued that the use of word "will" in the caution indicated that the police intended to charge the Defendant and submit him to trial. 8. During the course of the second interview the police asked a number of questions which Miss Heath submitted constituted a reverse caution, I set out the passages in full:- "215 [police officer] Do you understand how serious this is? SG [translator] Speaking in Portuguese. Do you know the penalty for trafficking Class A Drugs in this Island? SG Speaking in Portuguese. The starting point is around about 14 years. SG Speaking in Portuguese. If you're convicted of that offence, you could be a very old man. SG Speaking in Portuguese. If there is anything you know about this, damage limitation, give an explanation, the only explanation will be now, this is your only chance to give that explanation, and now is the time to give it" (emphasis added by the defence)" The effect of this, she said, was more serious than the caution given because it took away the voluntary aspect of the interview and the Defendant's right to silence. She equated it to the reverse caution in the case of AG v Batho

[2004] JLR 256, where the police, when referring to the Defendant's cash, said:- "I want to know exactly where it came from. You're obliged to tell me where it's come from because there will be a financial investigation into you." The Court found that the Defendant in that case had been told, quite wrongly, that he was obliged to tell the police where his cash had come from. This, it found, took away the voluntary aspect of the interview and the right to silence. 9. Miss Heath pointed out that contrary to the guideline notes 10C, the police did not test the Defendant's understanding of the caution and the police did not go on to explain it in their own words. However the interview was conducted through an interpreter through whom the Defendant confirmed that he understood the caution and there was no apparent need for his understanding to be further tested or for the caution to be put into the own words of the police. This criticism was not pursued. 10. At the beginning of the first, second and third interviews the police reminded the Defendant of his right to free legal advice, but not in the express terms of Section 12.2 of the Code of Practice which requires the police to remind the suspect of his entitlement to be afforded facilities "to consult a legal representative in private whether by telephone, in writing, or in person." Miss Heath accepted that the substantive purpose or rationale of this part of the Codes of Practice had been fulfilled and in my view this constituted a technical breach. 11. At the beginning of the third interview, the police did not ensure that the Defendant was aware that he remained under caution as required by Section 10.5 of the Codes of Practice after a break in questioning. There was also no reminder about legal advice. It is clear however that the second and third interviews were intended to be one interview but the tape ended prematurely. All that happened was that a new tape was installed. The Defendant confirmed at the outset of the third interview that this is what had happened. Thus whilst there was a very short break in questioning, there can have been no doubt on the part of the Defendant that he remained under caution and that he was aware of his right to legal advice. Miss Heath accepted that this was not her strongest point. In my view if there has been a breach of the Codes of Practice in this respect, then it is a technical breach only. 12. The following principles can be deduced from the English authorities dealing with the English equivalent of Article 76:- (i) A breach of the Codes of Practice does not lead automatically to the exclusion of the evidence so obtained. (ii) Where there is a breach, the Judge has a discretion to exclude the evidence. (iii) The breach must be "significant and substantial" to justify exclusion. (iv) In exercising the discretion the Judge should have regard to the rationale of the provisions of the Codes of Practice. (see Archbold 2007, paragraphs 15-14 to 15-16.) 13. In *R v Quinn*

[1990] CRM LR 581, Lord Lane CJ underlined the general nature of the discretion:- "The function of the Judge is therefore to protect the fairness of the proceedings, and normally proceedings are fair if a Jury hears all relevant evidence which either side wishes to place before it but proceedings may become unfair if, for example, one side is allowed to adduce relevant evidence which, for one reason or another, the other side cannot properly challenge or meet." 14. Mr Baker for the Crown submitted that it would be extraordinary if this evidence were excluded from the sentencing process. The proper course, he

submitted, was for there to be a Newton Hearing so that the Jurats can decide what weight to give to the admissions. In particular he argued:- (i) That the one error in the delivery of the cautions was not one of significance or consequence. The purpose of the caution, he submitted, is twofold: first to inform the Defendant that he has a right to silence; and second to inform him that his words can be used against him. The caution delivered satisfied both those requirements and the rationale of the relevant part of the Code. If it had any effect it can only have been to reduce the likelihood of the Defendant saying anything of significance. (ii) As to the alleged "reverse caution" he argued that the police simply meant that it was the Defendant's last chance to give an explanation to the police and so he says it was. The Defendant had already been told that if charged the matter would go to Court and it was for the Court, not the police, to decide guilt. There was no question of the Defendant thinking that he would have no opportunity to challenge the prosecution in Court and nor had he given evidence to say that this was his belief. In any event the Defendant went on to provide "no comment" answers after that part of the interview and only confessed when later confronted with the evidence of Tanya Mona Gomes. 15. As it stands the Defendant is scheduled to be sentenced before the Superior Number this Monday. Evidence is not adduced before the sentencing Court. If the Crown do not accept the defence account of the facts and, as here, the discrepancy is such as to have a significant effect on the level of the sentence, then the issue would ordinarily be resolved through a Newton Hearing. The defence has not, as I understand it, yet put forward its version of the facts upon which it says the Defendant should be sentenced and no Newton Hearing has, as yet, been ordered. As I see it, however, and as submitted by Mr Baker, I am asked to rule as to whether these admissions should be excluded from a Newton Hearing if one is ordered. As per *R v Quinn* my function is to protect the fairness of that Newton Hearing. 16. There has been no application for a *voir dire*. The Crown has not admitted any breaches and have not sought through evidence to justify what may be *prima facie* breaches and the defence have not sought to call the Defendant. Both counsel submitted that where the breaches of the Codes of Practice are clear from the record, no evidence is required. I am asked therefore to rule on the basis of the papers filed and in particular the transcripts. 17. The use of the word "will" as opposed to "may" in the caution is a breach of Section 10.2 of the Codes of Practice. The Crown do not seek to justify it. There is no allegation of bad faith and I assume therefore that it was a mistake - a regrettable mistake - as I can see no excuse for an experienced officer (as in the case here) not following the precise and well known form of the caution. Regrettable as it is, as Lord Lane CJ said in *R v Delaney* *The Times*, 30 th August 1988:- "It is no part of the duty of the Court to rule a statement inadmissible simply in order to punish the police for failure to observe the Codes of Practice." 18. I accept the submission of Mr Baker that the caution as delivered did satisfy the two purposes or rationale of the caution and in my view for the reasons set out by Mr Baker this breach of the Code of Practice taken alone was not "significant and substantial." 19. Was there a reverse caution taking away the voluntary aspect of the interview and the Defendant's right to silence? I have not heard evidence from the Defendant as to how he understood the passage complained of. Miss Heath says

that it is blatantly clear that this is a breach of the Codes of Practice. The Defendant was being told that he was obliged to give an explanation. In my view, in contrast to the reverse caution in the Batho case, it is not at all clear that this is so. Whilst it is possible to place that construction upon it, it is more amenable, in my view, to the interpretation placed upon it by Mr Baker namely that it was the Defendant's only chance to give an explanation to the police. The following factors support the Crown's interpretation:- (i) The two cautions, notwithstanding their reference to the word "will", made the Defendants right to silence clear. (ii) The police had explained earlier the different roles of the police and the Courts and in particular that it is for the Courts, and not the police, to decide guilt. (iii) It is necessary to look at the context in which the words were used. Up to that point in the interview the police had put to the Defendant evidence in relation to his finances, his mobile phones, and the observations of the police, and he did not, immediately following the alleged reverse caution, give any explanation as to those matters. It was only later, after the evidence of Tanya Gomes had been put to him and after some further "no comment" answers, that he made the admissions. In other words the reference to this being the last chance to give an explanation does not appear to have been the catalyst for the admissions that followed later. I would also add that it seems to me unlikely that anyone living in a western democracy and particularly in this era of human rights would readily believe that he could be deprived of the ability to put his explanation to a Court of Law. It is possible but I would need to be persuaded on evidence. 20. I conclude therefore that the passage complained of did not constitute a reverse caution and thus a breach of the Codes of Practice. It follows that I cannot find that there was a "significant and substantial" breach in this respect. On looking at all of the matters complained of, I do not find significant and substantial breaches enabling me to justify excluding these admissions from a Newton Hearing. The application therefore fails. Authorities Police Procedures and Criminal Evidence (Jersey) Law 2003. Police Procedure and Criminal Evidence (Codes of Practice) (Jersey) Order 2004. R v Hussain

[2005] EWCA Crim 31 . AG v Batho

[2004] JLR 256 . R v Quinn [1990] Crm LR 581. R v Delaney The Times, 30th August 1988. Page Last Updated: 20 Jul 2016 BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII URL: https://www.bailii.org/je/cases/UR/2007/2007_217.html

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Prepared on 23 October 2026 · Esheria