

JERSEY / JUDGMENT

AG -v- H [2012] JRC 187 (15 October 2012)

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JUDGMENT

THE commissioner: 1. The defendant is due to stand trial on seven counts of indecent assault and one of inciting an act of gross indecency in respect of three young girls and applies to the Court to exclude the whole of the interview under caution conducted with him by officers of the States of Jersey Police on 23 rd March, 2012. 2. The hearing proceeded by way of voir dire at which I heard evidence from Detective Constable (now retired) Timothy Rowe and Detective Constable Christina MacLennan. The defendant elected not to give evidence. Before setting out the defence submissions it is helpful to recount in a broad outline the events of rd March, 2012, from the facts which were not in dispute. 3. The defendant, who is 76 years old, was taken to Police Headquarters at 10:15 on the morning of the 23 rd March, 2012. At 10:19, his rights and entitlements were read to him. The part which was read was in the following terms:- "STATES OF JERSEY POLICE Notice to Detained Persons To be read to Detained Person (and Appropriate Adult) If you are asked questions about a suspected offence, you do not have to say anything unless you wish to do so, but what you say may be given in evidence. YOU HAVE THE RIGHT TO: TO BE AFFORDED FACILITIES TO CONSULT PRIVATELY WITH A LEGAL REPRESENTATIVE. HAVE SOMEONE TOLD THAT YOU HAVE BEEN ARRESTED. CONSULT A COPY OF THE CODES OF PRACTICE COVERING POLICE POWERS AND PROCEDURES. YOU MAY DO ANY OF THESE THINGS NOW, BUT IF YOU DO NOT, YOU MAY STILL DO SO AT ANY OTHER TIME WHILST DETAINED AT THE POLICE STATION. IF YOU ARE CHARGED WITH AN OFFENCE YOU WILL BE GIVEN A COPY OF THE CHARGE SHEET(S) LEGAL ADVICE You will be afforded facilities to speak to a legal representative at the Police Station at any time, Day or night. Legal Advice is provided by members of the Law Society. It is not generally available outside of office hours. Access to legal advice can only be delayed in certain circumstances. You may talk to the legal representative in private or on the telephone, and the legal representative may come to see you at the Police Station. If the Police want to question you, you can ask for the legal representative to be there. If there is a delay, ask the Police to contact the legal representative again. Normally the Police must not question you until you have spoken to the legal representative. However, there are certain circumstances in which the Police may question you without a legal representative being present. If you want to see a legal representative, tell the Custody Officer at once. You can ask for legal advice at any time during your detention. Even if you tell the Police you don't want a legal representative at first, you can change your mind at any time. Your right to legal advice does not entitle you to delay procedures under the Road Traffic (Jersey) Law, , as amended, which requires

the provision of breath, blood or urine specimens." 4. The form was then given to him; it contains further information about the rights and entitlements of detained persons in addition to that which is set out above. At 10:19, the defendant asked to speak to his own legal representative, Advocate Dorey, who asked for a delay until she had been able to speak to a specialist lawyer in this field of work. The defendant then spoke again to Advocate Dorey at 11:14 and at 11:37 he informed the custody officer that he "does not now require further legal advice prior to interview". This was confirmed to the custody officer by Advocate Dorey herself. 5. The interview took place over five sessions separated by short breaks as follows:- "23 March 11:59

- 12:42 Interview suspended. Drink of water offered. 12:47-13:28 Interview suspended. Cup of hot chocolate and flapjack received. 14:19-15:01 15:04-15:46 15:49-16:22" The overall length of the interview is therefore 3 hours and 20 minutes. 6. At the beginning of the interview, the defendant was cautioned by DC Rowe (284) and questioned on his understanding of the caution as follows:- "284 Could you explain to me in your own words what you understand that caution to mean? H You got me there *laughs* OK H The it means that whatever I say as from now um under caution will be recorded OK, it also means the first part of it was you're not obliged to say anything unless you wish to do so H Oh yes, yes OK, which means that you have the right not to answer, OK? And anything you do say correctly will be recorded and it may be given in evidence, now that might be in your defence or against you, OK. So, stuff that's recorded today can be used for yourself to defend" 7. The defendant was then reminded of his right to advice as follows:- "284 Right. You have the right to receive independent legal advice and you can speak to an advocate or legal representative in private now or at any time during this interview. I believe you've already spoken with your legal adviser H I have OK. Are you happy with the legal advice you've received so far? H Yes If you wish to speak again with your legal adviser, let me know and we will facilitate this for you, OK? That's an ongoing right throughout the interview, OK? Are you happy with that? H Yes" 8. DC Rowe then inquired as to whether he was under the influence of any medication that might affect his thought processes and asked whether there was any reason why the interview should not go ahead to which the defendant replied:- "H *Pause* "cause I'm not guilty" 9. The defendant then began to answer questions with " No comment " from which DC Rowe gathered that his advice had been to go "no comment" throughout the interview. Whilst appreciating that advice, DC Rowe said this:- "That's fine. It is only advice and if you feel that you want to tell us something. It's up to you to make the decision whether or not you tell us, if you've got something to tell us that would help you or would explain something that we ask you, then it is your decision whether or not you tell us, OK?" 10. The defendant said he had an idea of what the allegations were from " his niece " with whom he had discussed it at length; the police pointed out that the complainant was in fact his granddaughter causing laughter (he subsequently said he regularly confused the names of his sons). He was not prepared to discuss his conversation with his granddaughter in accordance with his advice and the interview continued:- "284 No no, that's fine. That's fine, like I say it's given us, you a chance to put over your side of the things. H Yeah Alright, there's two sides to every story. This is a chance for you to explain H I hope my side comes

out Yeah H Well it will come out, um, but er, until I've discussed it with my lawyer, which I have already discussed it Mm hm H Um, I feel bound to, to do what they say otherwise I'll be, I'll be in the court again (indistinct) in their court, I was told, you know, you shouldn't have said that, or not that there's anything against it to say That's the thing, if there's nothing against it to say, I, you know H Um, I know ... It helps you H I know, I know it's um, all, all I can say, is as far as I'm concerned I have not abused anybody OK and I like I said this is your chance to, to tell us what's actually happened and give us your side of the story and maybe stop things going further than they are H (indistinct) I'm in a situation where I always follow my lawyer's advice OK H And while I openly would want to tell you and do want to tell you Mm, hm, OK H But and there's nothing nasty about telling you No H That doesn't involve any nastiness that's because the lawyers have told me to say no comment until I've had a meeting with them and then I feel my hands are tied `OK, no that's fine. Have you got anything so far Christina? No OK. What we'd like to do then, we don't know much about you, um again, you can go no comment to everything, but we'll go through some of your aspects of your life so we can understand you a bit better H Fine" (My emphasis) 11. The next 33 pages or so of the transcript then deal with lengthy answers to questions put to the defendant about his life and family relations and it was not until shortly after the interview which started at 14:19 that admissions were made. Those admissions started in this way after questions had been put to the defendant about his family:- "284 And do you have much to do with them? H Not a terrible lot, um, specially recently OK, why is recently? H Because of this incident, because of this OK why, why is that?" Admissions then followed. 12. It is relevant to point out that at the start of each section of the interviews, the defendant was cautioned again and reminded that he was entitled to and asked if he wanted legal advice. He declined on each occasion. Defence evidence and submissions 13. The grounds of the defence application are:- (i) That the admissions made by the defendant resulted from questioning by DC Rowe which was oppressive within the meaning of the Police Procedures and Criminal Evidence (Jersey) Law 2003 ("the Law"); and/or were obtained by an inducement made by the officer which was such as to render self-incriminating statements made by the defendant unreliable; that the material events took place in breach of paragraph 12.3 of Code C to the Law as set out in the Police Procedures and Criminal Evidence (Codes of Practice)(Jersey) Order 2004 ; that the material events activate the provisions of Article 74 and 76 of the Law. (ii) That additionally, breaches of paragraph Code C 12.2, whether taken independently or in concert with the breach of Code 12.3, mean that the admission of things said by the defendant on the occasion in question would so adversely affect the fairness of the proceedings that the Court ought not to admit that evidence pursuant to Article 76 of the Law. 14. The defendant's circumstances when interviewed were described by Mr Redgrave as follows:- (i) He was 76 years old. (ii) He had serious health concerns. Although the defendant did not give evidence, he filed a letter from his doctor dated 19th April, 2012, which was in the following terms:- "PROBLEM: Recent onset intermittent Chest pain Abnormal heart electrical conduction History of high blood pressure and high cholesterol Currently under intense stress H is at risk of having narrowing of his coronary arteries and therefore at risk of a heart attack (myocardial

infarction). Recognising this he has been started on heart protective medication and referred to Dr A Mitchell Consultant Cardiologist for further evaluation. Under conditions of intense stress, the hormones release (cortisol and adrenaline) thereby engendered - may lead to atherosclerotic plaque rupture (despite the use of protective medication) and sudden heart attack or depending on the plaque position sudden death . Until specialist cardiology evaluation is complete it would be appropriate in my view to limit exposure to ultra stressful events e.g. Court appearance, cross-examination as far as possible, on medical grounds." (Doctor's emphasis). (iii) He was in an anxious and flustered state, as exemplified by the fact that he could not remember the names of his own children, and was confused as to his relationship to this complainant. (iv) He was questioned for the better part of 4 hours. (v) He was unrepresented throughout. (vi) The defendant made it known to the interviewing officers that his lawyer had advised him to make no comment and that he intended to follow her advice. He proceeded to reply 'no comment' to questions being put to him. The defendant made it clear to the police that his lawyer had advised him not to comment until he had met with her. (vii) DC Rowe told the defendant that despite the legal advice which the defendant had received and despite his chosen course in following it, 'there's two sides to every story' and that this was his chance to put over his 'side of things'. Mr Redgrave said this was an attempt by the interviewing officer to persuade the defendant to speak in the absence of a legal adviser and contrary to legal advice which he knew had been given and which the defendant was electing to follow. This was, of course, done in a situation in which the defendant was unassisted by the presence of a legal adviser. 15. Whatever view is to be taken of that course by DC Rowe, the line was plainly crossed said Mr Redgrave, when DC Rowe said to him: " OK and like I said this is your chance to tell us what's actually happened and give us your side of the story and maybe stop things going further than they are" (his emphasis). This he said was telling the defendant that if he ignored legal advice and spoke to the officers an outcome might be that the defendant would not be prosecuted. This he said caused the defendant to speak, and was improper. 16. Mr Redgrave referred me to the following provisions of the Law:- "Article 1 "confession" includes any statement wholly or partly adverse to the person who made it, whether made to a person in authority or not and whether made in words or otherwise. Article 74(2) If, in any proceedings where the prosecution proposes to give in evidence a confession made by an accused person, it is represented to the court that the confession was or may have been obtained - (a) by oppression of the person who made it; or (b) in consequence of anything said or done which was likely, in the circumstances existing at the time, to render unreliable any confession which might be made by the accused in consequence thereof, the court shall not allow the confession to be given in evidence against the accused except in so far as the prosecution proves to the court beyond reasonable doubt that the confession, notwithstanding that it may be true, was not obtained as aforesaid". 17. Turning first to Article 74(2)(a) it is apparent, said Mr Redgrave, that the defendant made statements as a result of oppression, as that word is properly to be understood. 18. He referred me to R-v-Fulling

- [1987] 85 Cr App R 136, where the English Court of Appeal held that the word "oppression" in section 76(2)(a) of the Police and Criminal Evidence Act 1984 (upon which Article 74 is modelled) should be given its ordinary dictionary meaning, i.e. the exercise of authority or power in a burdensome, harsh or wrongful manner; unjust or cruel treatment of subjects, inferiors, or the imposition of unreasonable or unjust burdens that such oppression would be likely to entail some impropriety on the part of the interrogator. In this case, Mr Redgrave said that DC Rowe exercised his authority wrongfully by offering the defendant the hope that if he spoke, contrary to legal advice of which the officer was aware, the defendant might avoid prosecution. 19. Mr Redgrave submitted a similar analysis is available under Article 74(2)(b) of the Law. 'the circumstances existing at the time' were those set out above, and included the physical and mental condition of a 76 year old man in doubtful health and in a flustered state. The words '... and maybe stop things going further than they are' were such as to lead the defendant to suppose that if he offered the officer something of use to the officer his detention and interrogation might end earlier. 20. The position was akin to that, he said, in R-v-Barry
- [1992] 95 Cr App R 384 in which the appellant was led to suppose that cooperation with the police might be of some good to him, in that case by resulting in bail. 21. The approach to be taken under 76(2)(b) of the English Act (corresponding to Article 74(2)(b) of the Law) is set out in Barry . Three steps are prescribed, namely:- (i) Identify the thing said or done; (ii) Ask whether it was likely in the circumstances to render unreliable a confession made in consequence, taking into account circumstances particular to the defendant himself. The test is hypothetical to the extent that it relates not to the confession but to any confession. (iii) Ask whether the prosecution has proved beyond reasonable doubt that the confession was not obtained in consequence of what was said. 22. The approach in Barry was followed in R-v-Roberts
- [2011] EWCA Crim 2974, a case which on its facts Mr Redgrave said was even closer to the instant case. The appellant in that case was told by his employer that a confession would avoid police involvement and therefore prosecution. The conviction was quashed by the Court of Appeal on the basis that the appellant's incriminating statements should have been excluded:- 'In short, in consequence of such a plain inducement to confess, any confession was likely to be rendered unreliable.' 23. In the instant case it is to be recalled, said Mr Redgrave, that throughout hours of interview the defendant referred repeatedly to the advice he had received from his legal adviser but he acted contrary to it. It was plain that he may have been influenced by his desire to have an end to the interrogation and detention and to go home and by his belief that he would be more likely to achieve that by speaking to the officer and doing so in terms which might satisfy the officer. Entry 26 of the custody record shows that the police knew that the defendant was troubled at the prospect both of breaking a commitment to his daughter that evening and of being prosecuted. That entry I note is timed at 17:43 which is after the interviews had ended. 24. Barry also points out that while it is well established that breach of the Codes do not necessarily mean that evidence obtained in breach will be excluded, that does not mean that breaches of the

Code are irrelevant. 25. Code C Paragraph 12.3 is in these terms:- "No police officer may try to obtain answers to questions or to elicit a statement by the use of oppression or 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. If the person asks the officer directly what action will be taken in the event of the person answering questions, making a statement or refusing to do either, then the officer may inform the person what action the police propose to take in that event provided that the action is itself proper and warranted." 26. Mr Redgrave says therefore that in addition to the statutory provisions and case law to which reference has already been made, DC Rowe has compounded the fault by breaking the Code in two ways, namely by oppression in the sense in which that term is properly to be understood and by indicating possible action supposing the defendant answers questions. 27. Mr Redgrave says further and alternatively that the interview should be excluded under the provisions of Article 76(1) of the Law, which is in these terms:- "76 Exclusion of unfair evidence (1) Subject to paragraph (2), 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 affect the fairness of the proceedings that the court ought not to admit it." 28. Mr Redgrave submits that the circumstances

- his mental and physical state at the time and the breach of paragraph 12.3 of Code C - cause the evidence of potentially incriminating statements by him to have such an adverse effect on the fairness of the proceedings that the Court ought not to admit it. 29. As a separate and additional ground under Article 76(1) of the Law Mr Redgrave argued that evidence of the interview should be excluded because of breaches of a different paragraph of Code C, namely paragraph 12.2 which is in the following terms:- "Immediately prior to the commencement or recommencement of any interview at a police station or other authorised place of detention, the interviewing officer should remind the suspect of his or her entitlement to be afforded facilities to consult a legal representative in private whether by telephone, in writing or in person. It is the responsibility of the interviewing officer to ensure that all such reminders are noted in the record of interview." 30. Mr Redgrave acknowledged that at the commencement and each recommencement of the interview the defendant's right to legal representation was referred to. However, he says this was done by way of a bare mention and the interviewing officers did not give the notification required by the Code. The interviewing officers did not remind the defendant of his to consult with his lawyer by telephone or in writing. Even though the lawyer had (apparently) been unable to attend in person it should, he said, have been specifically mentioned to the defendant that telephone advice remained an option. I say "apparently" because it is not clear to me from the custody record that Advocate Dorey was unable to attend. 31. Mr Redgrave submitted that in the circumstances of this case particular care ought to have been taken in this respect. It is readily to be supposed, he said, that had the proper emphasis been given as required by the Code the defendant may well have asked to contact his lawyer again. Had

that happened it is equally to be supposed that the lawyer would have repeated the advice and taken such proper steps as were appropriate to ensure that the advice was not eroded by the interventions of the interviewing officers. 32. It was evident to the interviewing officers, said Mr Redgrave, that the defendant, whose vulnerability was apparent, set a premium on the legal advice which he had received and repeatedly expressed the wish to rely on it. It is a feature which runs through the whole course of the hours of interview. It is a feature which the defendant made expressly clear to the interviewing officers. It was a feature which the officers repeatedly disregarded. It was in those circumstances, said Mr Redgrave, that the protections offered by the Code were of very great importance and in which breaches of the Code have a particularly prejudicial effect on the fairness of the proceedings. 33. Mr Redgrave points to the fact that in circumstances which he said were akin to these, the Courts have excluded interviews on the basis of breaches of this provision of the Code. He referred me to R-v-Sanusi

[1992] Crim LR 43 (CA) and R-v-Gokan and Beycan (Court of Appeal Criminal Division unreported 10 th October 1989). Specifically the case of Gokan points, he said, to the importance of scrupulous attention to remarks about legal advice made by the police to vulnerable interviewees. 34. In essence, Mr Redgrave said there were two elements to the interview which made its admission unfair, namely an improper inducement followed by the tactic of asking extensive and in part irrelevant questions about the defendant's life and family which lured the defendant into eventually answering questions which could only harm his case against the advice DC Rowe knew he had received. In all the circumstances, his spirit and ability to follow that advice had been broken by the tactic used. Mr Redgrave accepted that what can only have been minutes before the admissions started, the defendant had been reminded of his right to legal advice and declined to exercise it. What DC Rowe should have done, he said, was stop at the point where questions relating to the family had ended and before starting on questions relating to the allegations he should have asked the defendant whether he was happy to continue without legal advice. It was important that he was reminded of the significance of what he was saying but knowing that by the use of this tactic the defendant might be persuaded to part from his lawyer's advice and that these questions would not have been answered if the lawyer had been present, DC Rowe was under an extra duty not to influence the defendant to go against what he knew to be his interests. Prosecution evidence and submissions 35. Miss Fitz for the prosecution accepted the burden upon it under Article 74 to prove beyond reasonable doubt that:- (i) The confession was not obtained by oppression and/or (ii) The confession was not or may not have been obtained in consequence of anything said or done which was likely in the circumstances existing at the time, to render unreliable any confession which might be made in consequence of it. 36. The prosecution therefore called DC Rowe and DC MacLennan to give evidence and relevant parts of the recording of the interview were played to me, so that I could judge for myself the demeanour of the defendant. 37. In evidence DC Rowe was referred to the confidential log maintained in relation to the Booking in Assessment Questions put to the defendant in relation to his health. To the

question " Do you have any illness ", the defendant had answered " Cholesterol" and said he was taking medication for that. 38. DC Rowe said he had no concerns as to the defendant's health before the interview began. The defendant seemed confident and relaxed and did not appear to him to be particularly flustered, bearing in mind that anyone being interviewed under caution would be likely to be nervous. At times, the defendant was jovial. Notwithstanding his mistakenly calling his granddaughter his niece, the defendant was not confused and indeed spoke freely and at length during the interview. The principal witnesses in the case were members of the family and it was relevant for the defendant to be asked about his life and the family relationships. It was the defendant who brought up " the incident " which led to him making admissions. 39. In terms of Code 12.2, he thought he had complied with this requirement, although he accepted he had not specifically mentioned obtaining advice "in writing". In terms of Code 12.3, he did not indicate what action would be taken by the police, such as for example, cutting short the interview or letting the defendant out on bail. He was simply saying that this was the defendant's chance to give his side of the story and it was quite possible that depending on what he said, that could stop things going further. 40. In cross-examination, DC Rowe accepted that he knew the allegations made by the granddaughter, and accepted that it would be helpful to the investigation if the defendant had admitted what had been said between the defendant and the granddaughter, which the granddaughter had tape recorded, but the police needed to hear his side of the story. DC Rowe did not accept that any answers given by the defendant would be unlikely to assist him in his defence. The questions about the family were not a trick or a tactic to lure the defendant into making admissions - they were relevant questions. He did not lull the defendant into a false sense of security. The police needed to know more about him and the family dynamic. 41. In any event he said that even if a defendant has decided to answer "no comment" in an interview, it is appropriate to continue to put questions to him and he had simply conducted the interview in accordance with his training. The laughter that could be heard on the tape was not nervous laughter - he laughed with the defendant at the mistake over the grandchild. 42. He had repeatedly reminded the defendant of the caution and his right to have legal advice and in his view, the defendant had not forgotten the legal advice he had received. If the defendant had wanted Advocate Dorey to attend the interview, the police would have waited until she was available. It was the defendant's choice to start talking about "the incident" and he was under no duty to break the flow of the interview, nor to repeat warnings that had in any event been given shortly before. 43. DC MacLennan said that the defendant appeared well and did not seem to be anxious or flustered. He smiled and laughed on occasion. The atmosphere at the interview was quite relaxed. At no stage did she think the interview should have been stopped. She recalled that he mixed up his children's names, but he said he normally did that. She felt unable to comment on the suggestion that laughter heard from the defendant in the interview was nervous laughter. 44. I turn now to the prosecution's

submissions.

45. Miss Fitz submitted that the fact the defendant is 76 years of age does not of itself make the defendant vulnerable. The defendant is an intelligent man, she said, who has greater knowledge than most of police procedures. He was a Constable's Officer and then a Centenier in Grouville for 8 to 9 years in the 1980s. He describes in interview how he had run a hotel and operated a building company. 46. The defendant did not declare any health issues to the police upon detention save for "cholesterol" for which he was taking medication. At 11:50 on 23 March (custody record entry 13) his partner informed the police he needed to take cholesterol tablets every day and drink plenty of water. He assured the custody officer he had taken his medication and was given water. At 12:52 on 23 March (custody record entry 15) it is confirmed that the only medical issue reported is high cholesterol and he has taken his medication. 47. At the commencement of the interview process the defendant is asked if he under the influence of any prescribed or non-prescribed drugs. He twice responds "no". When the officer states "um, I believe you have taken some medication", he replies "yes". When asked if it affects his thought process he says "no" and when asked if there is any reason why the interview should not go ahead, he makes no reference to a medical problem, but says "'cause I'm not guilty". 48. After interview and having been detained overnight the defendant was seen by police doctor Mandy Johnson and declared fit for detention and interview (custody record entry 67). 49. It was not until the police sought to interview the defendant on 25 April, 2012, on a different matter, when he was accompanied by Advocate C Whelan that a medical issue was raised and the letter from Dr Jackson produced. Miss Fitz said the following points are of note:- (i) The letter is dated 19 April, 2012, almost a month after the interviews that the defendant seeks to exclude (he does not seek to exclude the interview of 19 April which is unrelated to these proceedings). (ii) The letter refers to recent onset intermittent chest pain and a history of high blood pressure and high cholesterol and that he is currently under intense stress. (iii) The defendant is said to be at risk of having narrowing of his arteries which can lead to heart attack. He has been started on heart protective medication and referred to a cardiologist. (iv) There is nothing to indicate the defendant was facing any risk at the time of the relevant interviews. (v) The issues referred to in the letter may well arise from the post charge stress. This view is supported by the defendant's failure to make mention of any medical problem other than cholesterol at detention and interview and his relaxed attitude during questioning. (vi) In any event it is noted that the doctor's letter was not used to suggest that the defendant was not fit to be interviewed on the 25 th April. Advocate Whelan indicated that he was content for the interview to proceed but asks that there be no "confrontational stress". Miss Fitz contended that there was no confrontation beyond normal questioning during the March 23 rd interview. 50. There is no evidence, Miss Fitz submitted, that the defendant was in an anxious and flustered state. In the custody record the following is recorded:- "Entry 12 DP informs me that he does not now require further legal advice prior to interview 11:37 Entry 15 DP is calm and compliant 12:52 Entry 25 DP reading magazine in cell (post interview) 17:26 Entry 26 He did show some concern at the likelihood of a

prosecution being instigated against him and his desire to attend a function with his daughter later that evening. Given the circumstances and his mild reaction to this situation he will be placed on half hourly check. 17:43 Entry 34 Reading magazine in cell 19:27 Entry 35 Reading magazine in cell 19:50 Entry 36 Sleeping in cell 20:17 Entry 42 Taken to yard for exercise 21:42 Entry 46 Ate a meal 22:58 Entry 47 The DP's behaviour has not changed since charge and he is accepting of the situation. Risk assessment His behaviour has not raised any concerns at this time. Standard risk level 1. 23:04 Entry 53-63 Asleep in cell (11 observations) 01:13-06:29 Entry 70 Reading 08:53" 51. The defendant is relaxed throughout the interview, "chatty" with the police officers and often heard laughing. Excerpts of the tape recordings were played and the transcripts themselves illustrated relaxed exchanges. 52. The defendant confuses certain family relationships but that does not show that he is stressed as a result of the interview as suggested. At page 14 of the interviews he states he always gets his two sons Craig and Aiden confused. 53. The length of the interviews, namely 3 hours 20 minutes (not four hours) was largely accounted for by the defendant's lengthy answers to questions put to him. 54. As to the defendant being unrepresented, Miss Fitz referred to the custody records which show that his rights and entitlements were read to him, that he had requested legal representation and been advised by Advocate Dorey and informed the custody officer that he did not now require further legal advice prior to the interview. He was repeatedly reminded of his entitlement to legal advice and asked whether he wanted legal advice during the interviews. 55. Miss Fitz accepted that it is correct to say that the officer did not remind the defendant on each occasion that he had the right to take advice specifically "in private whether by telephone, in writing or in person" in strict compliance with Code 12.2. It was obvious that advice would be taken by telephone or in person. The defendant clearly knew he was able to take advice at any time; he had already taken advice in private on the telephone and had declared that he did not want further advice. To have told him he could obtain advice in writing would have been of no practical benefit to him whatsoever. The defendant also had a written copy of these rights with him at all times. 56. Miss Fitz submitted that the police did not improperly attempt to persuade the defendant to answer questions against legal advice and or improperly induce him to speak by suggesting that if he did so it might prevent him being prosecuted. 57. In addition to DC Rowe reminding the defendant repeatedly of his right to remain silent, he repeatedly endorsed the defendant's right to go "no comment". The police are entitled and indeed obliged to continue to put questions even if an individual chooses to answer no comment. Miss Fitz referred me the Police National Investigative Interviewing Strategy 2009 which states at paragraph 1.4 under the heading "The Principles of Investigative Interviewing" that "even when the right of silence is exercised by a suspect, investigators have a responsibility to put questions to them". 58. Miss Fitz argued that there was no inducement. The police officers' words, she said, need to be put into context. The defendant tells the police he is "not guilty". In that context the police tell him that the advice he has received is only advice and "if you've got something to tell us that would help you or would explain something that we ask you then it is your decision whether or not you tell us, OK?" The officer continues to ask questions as appropriate. The defendant replies:- "er, other than that there's no comment

at the moment". And then "sorry I just have to wait till we see the lawyer on that one". "no comment". The police officer says: "That's fine" and reiterates he is just giving the defendant a chance to put over his side of things which is one of the legitimate purposes of an interview. The defendant says he hopes his side comes out but that it can't come out till he has discussed it with his lawyer again otherwise "I'll be in their court, I was told, you know, you shouldn't have said that or not that there's anything against it to say." He then reiterates he hasn't abused anyone. It is in this context the police officer says - "this is your chance to, to tell us what actually happened and give us your side of the story and maybe stop things going further than they are." 59. This, she said, is a legitimate observation in the context of the defendant's protestations of innocence and stated desire that his side of the story should come out. As stated in the Police National Investigative Interviewing Strategy 2009 , interviews can "direct an investigation, which in turn can lead to a prosecution or early release of an innocent person ". 60. This comment by DC Rowe mirrors advice given to defendants by defence lawyers that if a client has a defence there will be advantages to this being placed on record at an early stage either in the hope that the police will decide not to prosecute or with a view to strengthening that defence. Miss Fitz referred me to the following passage at paragraph 5.136 of *Defending Suspects at Police Stations* by Ed Cape:- "If the client has a specific defence, there will be advantages to this being placed on record at an early stage, either in the hope that the police will decide not to prosecute or with a view to strengthening that defence for the purposes of a trial." 61. Miss Fitz submitted that this case is entirely different from the situation in *Roberts* where there was an inducement to confess in return for not proceeding with a prosecution. 62. The exchange concludes with the defendant reiterating he has done nothing wrong and the officer says "OK, no that's fine - you can go no comment to everything". Miss Fitz contended that this does not, as suggested, constitute an inducement or constitute the police indicating what will happen if the defendant does or does not answer questions in breach of paragraph 12-3 of Code C. 63. In any event Miss Fitz submitted that Article 74(2)(b) requires a causal link between what is said and done and the confession. What was said or done must render the resulting confession unreliable. The officer's statement that the interview was the defendant's chance to give his side of the story and "maybe stop things going further than they are," does not amount, she said, to something said which could render the confession unreliable. 64. It is relevant she said to consider how the defendant responds to these words. He continues to reiterate the advice he has received. He states:- "I'm in a situation where I always follow my lawyer's advice", "...and while I openly would want to tell you and do want to tell you ..." "But there's nothing nasty about telling you..." The defendant then discusses his background with the officers from page 9 to page 44 of the transcript when he without prompting raises the issue of this complainant's allegations against him and the conversation which she taped. It is entirely clear that there is no causal link between the officer's words and the defendant's admissions. If the defendant wished to end his interrogation early he would not have spent from pages 9 to 44 telling them his life story. 65. As to oppression, Miss Fitz contended that this constitutes an extremely serious misuse of power and it was clear that the interview of the defendant was carried out:- (i) In a relaxed fashion. (ii) With careful attention to setting

out his right to silence and entitlement to legal advice at commencement and each recommencement. (iii) After he had received legal advice from an advocate of his choosing on two occasions and had indicated the interview could continue without further advice. (iv) Without exciting hope or imparting fear. (v) Without any impropriety on the part of the officers concerned. 66. It was apparent, Miss Fitz says, that there was no oppression and the defendant spoke freely and voluntarily. 67. Whilst a technical breach of paragraph 12-2 was accepted by Miss Fitz, a breach of Code 12-3 was not accepted. In any event she said breaches of these paragraphs as alleged would not render the interview inadmissible. The Court will only, and even then not always, rule evidence inadmissible if there are "significant and substantial" breaches of Code C, e.g. a failure to caution, denial of legal representation, breach of the "verballing provisions" (Archbold paragraph 15-411) . 68. These breaches, if established in both cases were minor and caused no prejudice to the defendant and did not affect the voluntary nature of the admissions. 69. There is no unfairness to the defendant, Miss Fitz concluded, in the admission in evidence of his interview under caution and no grounds to exclude the same. Decision 70. I am persuaded by the submissions of Miss Fitz. Accepting on the authority of Fulling that the word "oppression" in Article 74(2)(a) is to be given its ordinary meaning, it is not remotely arguable, in my view, that these admissions were obtained by oppression. The conduct of an interview is a core duty of the police and central to the success of an investigation, whether that leads to a prosecution or the release of an innocent person. Whilst investigators must act fairly when questioning suspects, I note that paragraph 1.4 of the Principles of Investigative Interviewing Strategy 2009 referred to above provides as follows:- "Investigators should recognise the positive impact of an early admission in the context of the criminal justice system. Investigators are not bound to accept the first answer given. Questioning is not unfair merely because it is persistent." To the extent that DC Rowe persisted in inviting the defendant to put his side of the story notwithstanding the advice he had received, it was not unfair, let alone oppressive; in my judgement it did not "break the spirit" of the defendant or his ability to follow advice. It cannot be said that DC Rowe used his power as interviewing officer in a burdensome, harsh or wrongful manner, was unjust or cruel in his treatment of the defendant or imposed unreasonable or unjust burdens upon him. 71. As for impropriety, it is the case that DC Rowe did not comply strictly with Code 12.2, which provides that on the commencement and any recommencement of an interview, the defendant should be reminded of his entitlement to be afforded facilities to consult a legal representative in private "whether by telephone, in writing or in person". Whilst at the commencement and each recommencement DC Rowe reminded the defendant of his entitlement to legal advice and asked him whether he wanted further legal advice, he did not specifically mention that that advice could be obtained by telephone, in writing or in person. At the beginning of the interview, he did emphasise that the defendant could speak to Advocate Dorey at any time during the interview and that this was an ongoing right throughout the interview. The defendant had already spoken to Advocate Dorey by telephone and it seems to me obvious that if he had exercised that right, he knew it could be either by telephone or indeed in person. As to "in writing", neither counsel could see how that could apply in practice, save

perhaps by email or text, but in any event, in my view, the substance of Code 12.2 had been complied with and to the extent that there were breaches, they were not significant or substantial. I note in passing that the form read to detained persons does not itself refer to consultations with legal representatives "in writing". 72. Turning to Code 12.3, I accept Miss Fitz's submissions that DC Rowe's statement "this is your chance to, to tell us what actually happened and give us your side of the story and maybe stop things going further than they are" taken in context was a legitimate observation. This is quite different from the facts in Roberts where a shop manager, suspecting a member of staff of stealing an iPod, took him to the staff room and said "We can sort this out internally or get the police involved"- a plain inducement to confess as the Court of Appeal commented. That was immediately followed by an admission. 73. The defendant in this case was not induced to confess. He was not being told if you confess there will be no prosecution or you will be able to go home. DC Rowe was making the perhaps obvious point that if the defendant were to tell his side of the story it may affect the investigation. That is what interviews can do-they can direct an investigation that in turn can lead to a prosecution or early release of an innocent person. I do not agree with Mr Redgrave that giving his side of the story can only have harmed the defendant. His account may have wholly undermined the credibility of the complainants-as the jury are told when being directed on corroboration, experience has shown that people who say that sexual offences have been committed against them sometimes, and for a variety of reasons, tell lies. I find therefore that there has been no breach of Code 12.3. 74. If I am wrong in so finding, then I accept Miss Fitz's further submission that there is no causal link between what was said "maybe stop things going further than they are" and the admissions that were eventually made. It is clear from the transcripts that this statement had no effect on the defendant in that he maintained his position of "no comment" on his advocate's advice in contrast to the case of Roberts, where the admission immediately followed what was a clear inducement to confess. It was only some considerable time later that the defendant started to make admissions. His lengthy answers to the questions on his life and family would belie any suggestion that he had been led to suppose that if he offered something of use to the police his detention and interrogation might end earlier. I can see no suggestion from the transcript that he had a particular concern to terminate the interview early, in contrast to the facts of Barry where the defendant was desperate for bail because he had custody of his nine year old son and did not want custody to be transferred to his estranged wife. The defendant in this case did express a concern to attend a function with his daughter but only after the interview had ended. 75. Turning to Article 74(2)(b) of the Law and the circumstances existing at the time, I accept of course that the defendant is 76. Mr Redgrave asked me to take judicial notice of the fact that the mental strength and resolve of a person of that age would be less than a man in his prime. I think as a matter of common sense that is probably right but I have been able personally to hear the defendant in the interview, both at the beginning and towards the end and to read the transcripts and I find that he was a man who was in control and who did not appear anxious or flustered (beyond what one might expect of anyone being interviewed under caution). It was not suggested that the defendant's high cholesterol and risk of a heart attack affected his mental

faculties. High cholesterol is better described, I would have thought, as a condition that places a person at risk of heart failure rather than an illness. 76. It is noteworthy that when the second interview took place on the 25 th April, 2012, it was not suggested by Advocate Whelan, who accompanied the defendant, that even with the benefit of the doctor's advice, the interview should not go ahead and it was not suggested by Mr Redgrave that the interview on the 23 rd March, 2012, should not have gone ahead. There was nothing confrontational in the conduct of the interview that could have given rise to the " intense stress " the doctor refers to. It is true that overall the interviews were lengthy but there were regular breaks and refreshment taken. It is also true that the defendant was not represented, but that was his choice, a choice made after receiving advice from his own advocate. Furthermore it was a choice made repeatedly as each session started. 77. I reject the submission that because the defendant was vulnerable, the police were under an extra duty not to influence him to go against what they knew to be his interests when his lawyer was not present. Firstly, I do not accept that the defendant was vulnerable and therefore needed to be treated with particular consideration. Secondly, it was his choice that his lawyer was not present. Thirdly the duty of the police is to act fairly but with the aim of obtaining accurate and reliable accounts from the defendant about the matter under investigation, recognising the positive impact of an early confession in the context of the criminal justice system. This in my view they did. Their duties do not extend beyond this in the manner suggested by Mr Redgrave. 78. The defence submit that in circumstances akin to these the Courts have excluded interviews on the basis of breaches of the Code citing Sanusi and Gokan . In Sanusi , the defendant, a man from abroad with no previous convictions and unfamiliar with police procedures in England, had not been informed of his rights at all in clear breach of the substance of Code C3. In Gokan , the defendant, a Turkish Cypriot, who had not set foot in an English police station before, was not informed of his rights in any meaningful manner again in breach of the substance of Code C3. One can readily see that such breaches are significant and substantial but the circumstances of those two cases can in no way be described as being akin to the present case where the defendant, an experienced honorary police officer, was repeatedly advised of his rights. Nor can the facts of this case be said to be akin to the facts in Barry where there had been numerous breaches of Code C, including a failure to record interviews at all. 79. In considering Article 74(2)(b), I have approached the issue following the three stage test suggested in Barry (and as set out in Archbold 2012 edition at paragraph 15-338). I have already set out what was said and done by the police, which is not in dispute, and conclude that what was said and done was not likely, in the circumstances, to render unreliable any confession made in consequence, the test being objective. Finally, I conclude that the prosecution have proved beyond reasonable doubt that the admissions made in this case were not obtained in consequence of the things said and done. 80. Furthermore, applying Article 76 of the Law, where there is no burden of proof on either party, and having regard to all the circumstances as set out above, including the circumstances in which the admissions were obtained, I conclude that the admission of that evidence would not so adversely affect the fairness of the proceedings that I ought not to admit it. 81. In conclusion, I reject the defendant's application to exclude the whole or any

part of the interview under caution conducted with him by officers of the States of Jersey Police on 23 rd March, 2012. Authorities Police Procedures and Criminal Evidence (Jersey) Law 2003. Police Procedures and Criminal Evidence (Codes of Practice)(Jersey) Order 2004. R-v-Fulling

[1987] 85 Cr App R 136. Police and Criminal Evidence Act 1984. R-v-Barry [1992] 95 Cr App R 384. R-v-Roberts [2011] EWCA Crim 2974. R-v-Sanusi [1992] Crim LR 43 (CA). R-v-Gokan and Beycan (Court of Appeal Criminal Division unreported 10th October 1989). Police National Investigative Interviewing Strategy 2009. Defending Suspects at Police Stations by Ed Cape. Archbold 2013 edition. Archbold 2012 edition. Page Last Updated: 02 Feb 2017 BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII

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