

JERSEY / JUDGMENT

The Attorney General v Damian Rzeszowski

COURT

Royal Court

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Murder/Manslaughter - application to exclude certain evidence.**[2012]JRC148A****Royal Court****(Samedi)****7 August 2012**

Before : Sir Michael Cameron St. John Birt, Kt.,
Bailiff, sitting alone.
The Attorney General
-v-
Damian Rzeszowski
H. Sharpe, Q.C., HM Solicitor General.
Advocate J. C. Gollop for the Defendant.

JUDGMENT

THE BAILIFF: 1. This is an application by Advocate Gollop on behalf of the defendant to exclude certain evidence which the Prosecution wish to lead. It has been the subject of a ‘voir dire’. Shortly after the hearing, I notified the parties that, for the most part, I had dismissed the application. I now give my reasons. 2. The background is that the defendant, who is Polish, admits killing six people, including his wife and two children, on 14th August, 2011. He denies murder but has pleaded guilty to manslaughter on the grounds of diminished responsibility. The trial is due to start on Monday and it will be concerned solely with whether the defendant should be convicted of murder or manslaughter. 3. After the incident, the defendant was detained in hospital where, he was arrested and cautioned on 15th August. When well enough he was interviewed at Police Headquarters on 25th and 26th August, 2011. I am informed that he elected to give “no comment” responses throughout the interviews. He was charged with six counts of murder before the Royal Court on 26th August and remanded in custody. 4. On 31st August, he was visited in the prison by his parents who are also Polish. The parents were brought to the prison by PC Harasymowicz and DC Szejko, the former in her capacity as a point of contact for

- the defendant's family. Both officers are Polish speaking. 5. It would seem that, when the defendant was brought into the visitors' room to see his parents, PC Harasymowicz was in the room and was introduced to the defendant as a police officer by the defendant's father. She then stood just outside the room with DC Szejko. The door remained wide open and they could hear the conversation between the defendant and his parents. 6. The Prosecution seek to adduce evidence from PC Harasymowicz on two aspects of the conversation between the defendant and his parents. (i) At paragraph 5 of her statement, the officer states that, when describing the journey back from Poland to Jersey shortly before the incident, the defendant said that there were "signs" he should not go back to Jersey but did not, according to the officer, say anything about hearing voices, whereas he told Dr Eastman, the expert appearing for the Defence, that he heard voices during the journey back to Jersey. The Prosecution will seek to rely on this as part of their case that the defendant is making up things in relation to the hearing of voices. (ii) Paragraph 6 of the officer's statement records that, during the conversation with his parents, the defendant was very particular about his financial arrangements. The Prosecution will argue that this is relevant for the Jurats when deciding if the defendant was a remorseful man driven to do something terrible by his depression. I shall refer to what was said at this meeting as the first conversation. 7. The Prosecution also wish to adduce evidence of what was said at a second meeting the next day between the defendant and his parents. Again it was at the prison. On this occasion the same two police officers, who had brought the parents to the prison, sat in the room with the defendant and his parents. The defendant apparently said "good morning" to them in Polish when he was brought into the room. 8. Before this visit, PC Harasymowicz had asked the parents to ask the defendant for permission for the bodies of his wife and two children to be embalmed and about his wishes for their funeral, in particular whether their bodies should be buried or cremated. 9. The parents duly asked these questions of the defendant who gave his response. During the visit the defendant stated to his parents that he did not remember what had happened on 14th August but was able to say that Marta de la Haye and her daughter Julia were at his address for a visit. The key matter which the Prosecution seek to rely upon in relation to this conversation is that, at some point, the defendant's mother asked him if the incident occurred before or after the barbecue. He replied that the barbecue was long finished when "it happened".
10. The Prosecution wish to adduce this evidence as showing that, contrary to what he has since apparently said to medical experts, he does have some memory of the incident and they further rely upon it as showing that there was a gap between an argument with his wife and the killings.
 11. In her evidence in the voir dire, the officer said that she accompanied the parents to the prison at the father's request. She was given no instruction by her senior officers about her role during the visit. She said that, during the first visit, the defendant could see the officers and was well aware that they were at the door and were listening to the conversation. Indeed, at one point, she went back into the room for a moment at the father's request. There were also some prison officers in the room but presumably they did not understand Polish.

12. She said that, after the visit, she returned the parents to the flat where they were staying and then went to Police Headquarters where she made up her notes of what she had heard. This was at about 9pm. The visit had taken about an hour and had commenced at about 7:30pm.
13. In relation to the second visit, she said that again, following the visit, she had returned to Police Headquarters and made up her notes at about 10am, the visit having commenced at about 8:15am and lasted for approximately one hour. She said that, on each occasion, she made up her notes without reference to her colleague.

Submissions

14. Advocate Gollop submitted that I should exclude the evidence of the officer under Article 76 of the Police Procedures and Criminal Evidence (Jersey) Law 2003 on the grounds 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. His submissions fell conveniently into two parts.
15. First, he argued that what had occurred was unfair in that it effectively circumvented the defendant's right to silence. He had been interviewed at length and had exercised that right fully. He had subsequently been charged. By virtue of paragraph 17.5 of Code C, he could not therefore be questioned further. He was entitled to assume that his conversation with his parents was private and that it would not be recorded or used against him by the police when he had already shown that he wished to remain silent at all interviews. He was not cautioned before the meeting with his parents. He was not warned that anything he said might be recorded or used against him. Fairness required that either the police should not have recorded what was said or, if they were going to do so, they should have alerted him to that fact and cautioned him. In essence, the police should not be allowed to circumvent the right to silence in this way.
16. Secondly, he submitted that this unfairness was compounded by the failure of the police to comply with paragraph 12.13 of Code C which provides as follows:- "A written record should also be made of any comments made by a suspected person, including unsolicited comments, which are outside the context of an interview but which might be relevant to the offence. Any such record must be timed and signed by the maker. Where practicable the person shall be given the opportunity to read that record and to sign it as correct or to indicate the respects in which he or she considers it inaccurate. Any refusal to sign should be recorded."
17. He submitted that paragraph 12.13 was one of the "anti-verballing" provisions introduced by Code C and it was important that it should be adhered to. If the police had complied with the paragraph, the defendant would have been able either to confirm the accuracy of the police officer's note or to dispute it within a very short time of the conversation and while his memory about the conversation was fresh in his mind. As it was, the officer's statement is

dated 29th September, 2011, and this was only served on the Defence during the course of October as part of an enormous amount of material setting out the prosecution case. All of this had to be gone through over a period by the defence lawyers. Furthermore, they were acting under the handicap that the defendant was by then detained in Broadmoor and there were difficulties in obtaining instructions. As a result of the police failure to comply with para 12.13, the defendant was now faced with the prospect of trying to recall a conversation of many months ago and this had prejudiced his ability to dispute the accuracy of the police officer's evidence. The same problem applied to his parents.

18. For these reasons, submitted Advocate Gollop, it would be unfair to admit the officer's evidence and I should therefore exclude it. Discussion
19. Taking the first part of Advocate Gollop's submissions, I do not consider that the evidence should be excluded on the ground that, in effect, it circumvented the defendant's right to silence. The Solicitor General referred me to two cases in England and Wales which seem to me to be on point.
20. In *R-v Bailey and Smith* [1993] 97 Cr App R 395 the appellants had exercised their right of silence at police interview. They were subsequently charged and remanded back into police custody. Whilst they were in court, listening equipment was installed in a police cell. On their return from court, the police acted out a charade with the custody officer to trick the appellants into believing that the police did not want them to share a cell and thereby lull them into a false sense of security. They were in fact put together into the bugged cell and there made damaging admissions in conversation together. At the trial the evidence was admitted and the appellants were convicted.
21. The Court of Appeal held that the judge had properly exercised his discretion to admit the evidence. At 374 Simon Brown LJ said this: "Mr Merrylees' argument runs essentially as follows. These appellants had chosen to remain silent at interview. They had been charged. By virtue of paragraph C16.5 of the Code, the police were precluded from questioning them further. Yet by placing them together in a bugged cell and making them believe they could not be overheard, they were being tricked into speaking, and indeed - because their cell was bugged - speaking to the police. For the same reason, it is submitted, these admissions cannot properly be regarded a voluntary. This argument we cannot accept. Of course these accused at the relevant time could not properly have been subject to further police questioning. But that is not to say that they had to be protected from any opportunity to speak incriminatingly to each other if they chose to do so. Mr Merrylees' argument in our judgment breaks down at the point where it seeks to equate voluntarily talking to each other with making involuntary statements to the police - statements made, it is said, through their co-accused acting as the police's agent or instrument - an echo here of the arguments which failed in *Jelen and Katz*."

22. In passing, the court approved of an earlier decision in *R-v-Shaukat Ali*, (The Times February 19th 1991) which concerned the admissibility in evidence of transcripts of covertly tape-recorded conversations between the appellant and members of his family in the interview room at the police station the day after being charged. The argument in that case was that the confession had been obtained by entrapment and deceit and it was grossly unfair to admit it. The court rejected those arguments holding that:- “The circumstances in which the interview room was bugged, and the conversations which the appellant had with his family were recorded, are not comparable to any of the circumstances, so it seems to us, envisaged in these various provisions of the Code which [counsel] seeks heavily to rely upon ... The Code is absolutely silent as to a circumstance such as this, and it does not provide that there should be any kind of warning to an accused at a police station as to the fact that it might be possible that a police officer or police officers would in certain circumstances eavesdrop upon conversations that an accused person might be having with someone else at a police station, for example, with a fellow prisoner or with someone else with whom he was having an audible conversation about the matter in respect of which he was being kept in custody and in respect of which he may by that time have been charged. There is nothing in the Code which prohibits, so it seems to us, inferentially or directly, what was done by the police here in bugging the interview room.”
23. In *R-v-King (Joseph)* 2012 WL 1358021, the two appellants were placed in the back of a police van fitted with recording equipment following their arrest. During the conversation between them, they made damaging remarks. The Court of Appeal upheld the decision of the trial judge to admit the evidence on the grounds, inter alia, that placing them in the same police vehicle did no more than provide them with an opportunity to speak together in the belief that they were not being overheard and that no trick or subterfuge had been practised upon the accused so as to lead them to believe that they must make some response to their arrests. The court endorsed at paragraph 22 the general principle that the employment of subterfuge by the police in the course of an investigation will not automatically render evidence obtained in consequence inadmissible but that where the police have acted in such a way as to amount to an affront to public justice, an application may be made for the exclusion of the evidence.
24. In my judgment, subject to consideration of the second part of Advocate Gollop’s submission, the circumstances in which the evidence about the conversation between the parents and the defendant was obtained do not render it unfair to admit that evidence. I would mention in particular the following considerations:- (i) There was no subterfuge or trick employed by the police. Nothing was said to the defendant to suggest that what he said to his parents was confidential or could not be relied upon. (ii) On the contrary, the defendant was aware that the police were able to listen to all that he said. In the first conversation, he knew that they were just outside the door and could hear what was going on; in the second conversation they were actually in the room with him and his parents. (iii) This was not an interview. The police asked no questions about the incident. Anything that was said in relation to the incident came about as a result of voluntary discussions between

the defendant and his parents. (iv) Anything which the defendant said was entirely voluntary on his part and was not induced by anything said or done by the police.

- (v) On the basis of the English cases referred to, the evidence could properly have been admitted even if the police had covertly tape-recorded the conversation between the defendant and his parents. In those circumstances, it could not possibly be unfair for a police officer to provide an account of what was said when the defendant knew that the police were listening to the conversation.
25. Turning to the second part of Advocate Gollop's submissions, the first question is whether para 12.13 of Code C applies to a conversation such as occurred in this case. In my judgment it does not for the following reasons:- (i) One begins with consideration of what Code C is aimed at. It is entitled "A Code of Practice for the detention, treatment and questioning of persons by police officers". We are not concerned here with any of those matters. The defendant was no longer detained by the police, he was remanded in custody at the prison by virtue of a court order. He was not questioned by the police at an interview, as discussed earlier. His treatment was the responsibility of the prison authorities, not the police. (ii) As its title suggests, Code C is intended primarily to protect the interests of persons being detained and interviewed by the police. Virtually all the detailed provisions of the Code relate to that period. Where there is reference to a later period – e.g. when the police can interview a person after he had been charged – there is a specific reference which deals with what must be said or done during such an interview. (iii) The Solicitor General referred me to the observation of Auld J in *R-v-Jelen and Katz* (1990) 90 Cr App R 456 at 465 where he said:- "The provisions of the Code governing the detention, treatment and questioning of persons by police officers are for the protection of those who are vulnerable because they are in the custody of the police. They are not intended to confine police investigation of crime to conduct which might be regarded as sporting to those under investigation." He submitted that the Code therefore did not apply because the defendant was no longer in the custody of the police.
26. However that observation of Auld J was qualified in the later case of *R-v-Christou* (1992) 95 Cr App R 264 at 270 where Lord Taylor CJ said:- "In our view, although Code C extends beyond the treatment of those in detention, what is clear is that it was intended to protect suspects who are vulnerable to abuse or pressure from police officers or who may believe themselves to be so. Frequently, the suspect will be a detainee. But the Code will also apply where a suspect, not in detention, is being questioned about an offence by a police officer acting as a police officer for the purpose of obtaining evidence. In that situation, the officer and the suspect are not on equal terms. The officer is perceived to be in a position of authority; the suspect may be intimidated or undermined."

27. In my judgment, applying that observation, Code C does not apply to a situation such as the present. As I have already stated, this was not an occasion when the police asked any questions of the defendant; nor was it a situation outside the formality of an interview where the police officer and the defendant were not on equal terms and where the remark made outside the formality of the interview process needed to be recorded because of the ease with which a police officer might make up such an allegation.
28. This was a conversation between the defendant and his parents well after he had been charged. It was pure coincidence that the two police officers happened to be there because of their role as acting as liaison with the parents during their visit to Jersey. I do not consider that para 12.13 applies in circumstances so different from those for which Code C is designed to operate so as to protect a suspect.
29. I find therefore that there has been no breach of Code C. However, the question still arises as to whether it would be unfair to the defendant to admit the evidence on the ground that the defendant was not given the opportunity to comment on its accuracy at the time and is therefore at a disadvantage. In this respect the position differs from those in the cases to which I have referred where there was a tape recording of the discussion, so that there was no issue as to its accuracy. Here, it is solely the evidence of the police officer that the potentially damaging remarks were made.
30. I find that it would not be unfair to admit the evidence for the following reasons:- (i) The position is in reality no different from that where a defendant remanded in custody says something to a prison officer or to another inmate or is overheard making a remark to his parents or a visitor by a prison officer or another inmate. There would be no duty on such a prison officer or inmate to make a contemporaneous note and offer it as soon as possible to the defendant for confirmation. Such evidence would clearly be admissible if the remark was adverse to the defendant's case. If that is the position where the conversation is to or overheard by a prison officer or other inmate, why should it be any different simply because the conversation happens to be overheard (to the knowledge of the defendant) by a police officer? (ii) Indeed the position is not dissimilar to all the various interviews the defendant has had with various psychiatrists. Their reports contain evidence of what he has said to them but they did not have to submit their reports to him for early confirmation under para 12.13 as to what he had said to them. If it is not unfair for such evidence to be admitted, why should it be unfair for evidence of a conversation with his parents to be admitted unless the record of the conversation has been submitted to him for early confirmation? (iii) Para 12.13 is designed to protect the situation where a defendant is on his own with one or more police officers and where there is a risk of verballing. That is not the case here. The defendant was speaking with his parents and they would be available to give evidence about the accuracy of any conversation and to dispute the police officer's evidence if thought to be inaccurate or untrue. (iv) As already indicated, there was no element of trick or subterfuge. Anything the defendant said was entirely voluntary and was said in the context of a conversation between the defendant and his parents when he was aware that the police were listening.

31. For these reasons, I do not consider that there is anything unfair about admitting the evidence in the circumstances of this case and accordingly I allow most of it to be admitted.
32. However, the evidence must be relevant in order to be admissible. I do not consider that the point made by the prosecution at paragraph 6(ii) has any validity. The suggestion that, merely because the defendant, who on any view was expecting to be in prison for some time, was discussing financial arrangements with his parents, this indicates that he was not remorseful, is so tenuous as not to be relevant and therefore admissible.
33. Subject to excluding those parts of the both conversations which deal with financial matters I therefore rejected the defendant's application.
34. As a postscript, whilst I am satisfied that para 12.13 of Code C does not apply to a situation such as this, I invite the police to consider following the practice laid down in para 12.13 even in circumstances where the provision does not apply. To follow such a practice would avoid arguments such as occurred in this case and avoid the risk that, on a future occasion where the circumstances were very different, a Court might exclude the evidence. It seems to me that it can only be beneficial for the police to put a note of a conversation to a defendant at the earliest opportunity while the matter is fresh in his mind so that he can either confirm its accuracy or any dispute as to its accuracy can be identified at the earliest opportunity. Authorities Police Procedures and Criminal Evidence (Jersey) Law 2003. R-v Bailey and Smith [1993] 97 Cr App R 395. R-v-Shaukat Ali, (The Times February 19th 1991). R-v-King (Joseph) 2012 WL 1358021. R-v-Jelen and Katz (1990) 90 Cr App R 456. R-v-Christou (1992) 95 Cr App R 264.

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