

IN THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

ON MONTSERRAT

CASE MNIHCR 2019/0006

REGINA

V

SHERNYL BURNS

APPEARANCES

Mr Oris Sullivan, the DPP, for the Crown.

Mr Warren Cassell for the defendant.

2021: MAY 18

RULING

On admissibility of interview

- 1 **Morley J:** I am asked during trial¹ commencing on 17.05.21 to rule on the admissibility of an interview in which Shernyl Burns admits to bringing cannabis several times onto Montserrat from Antigua hidden in KFC buckets in early 2019 to be passed on to his uncle, Ashel Bramble, who is currently serving a sentence inter alia for being a cannabis dealer.
- 2 Burns is a talented cricketer, often travelling to Antigua, worried for his career, as a conviction will likely hamper his ability to travel and the propriety of his participation in international sport.

¹ On 26.05.21 Shernyl Burns was convicted by the jury of two offences of drug trafficking, meaning this ruling can now be published.

- 3 In March 2019, there was a major investigation concerning at least five persons importing cannabis onto Montserrat.
- a. Burns was arrested at 09.00 on 06.03.19, made no comment in interview that day on advice from Counsel Cassell, and the next, was charged with 'drug trafficking' at 10.00 on 08.03.19, and later that day, between 13.24 and 13.46, during 22mins, made full admissions.
 - b. Apart from these admissions, there is considerable evidence against Burns by reference to whatsapp messages on the phone of his uncle brought to his attention in the first two interviews.
 - c. The third interview, post charge, was said by the Crown to be volunteered, shortly after he talked with another lawyer, Counsel Marcelle Watts.
 - d. On 17 and 18.05.21, a jury having been sworn on 17.05.21 to try two counts of drug trafficking, there has been a *voir dire* on why he confessed.
 - e. The argument has been he was induced by a promise he would not be prosecuted but instead used as a Crown witness against his uncle, denied by the Crown, which the defence suggest ought to provide grounds for excluding the confession from the jury, and further to stay the case for abuse of the court's process.
 - f. On 18.05.21, after consideration of the matter, the court ruled the confession would be admitted, promising written reasons which are these.
- 4 Of interest has been Burns gave evidence on the *voir dire* saying his confession was true, suggesting he is indeed guilty as charged.
- 5 At the *voir dire*, there has been Crown evidence from Detective Inspector Ottley Laborde, Chief Superintendent Albert Williams, and Detective Sergeant Keniel Murrain, Burns gave evidence in his defence, and the court *proprio motu* called Counsel Watts, available then to be cross-examined by both Crown and defence. To distil matters:
- a. The video of the interview was played to the court, and Burns appeared clear of mind, though nervous, seeming aware he was making admissions which would cause trouble for himself and others.

- b. Laborde said there had been no promise of immunity, also saying implausibly he had not known of Burns two earlier no comment interviews, and he had no idea why he volunteered the third interview nor what he might say.
 - c. Williams said he had been briefed by Laborde and Murrain on the previous no comment interviews, was aware Burns had retained Counsel Cassell previously and it appeared now had Counsel Watts, was aware he would likely now make admissions, had no idea why, and there had been no promise made he heard.
 - d. Murrain said he was unaware of any promise, and had been told by Williams Burns had volunteered a statement though does not know why.
 - e. Burns said he was denied access to Counsel Cassell at about 07.00 on 08.03.19 by the cell-keeper reporting Murrain saying he had used his privileges, was later given his charge sheet by Murrain, and he was then told by Laborde Counsel Watts had been contacted to help by his mother or aunt. Next, he was taken to a room for an off the record conversation with Williams, Laborde, Murrain, and Inspector Wade, about how as an athlete it was in his best interests to make a statement, while they would 'do their best' so he would become a prosecution witness as he was not really who they wished to prosecute. He asked to speak to Watts, who later at the police station he said told him she would ask the DPP for immunity. Next, Laborde with Murrain said they could not get hold of Watts on the phone, but appeared to show a text from her on Laborde's phone he should cooperate. He then did so, in the third interview, and at that time was tired and in some confusion in his third day in an uncomfortable police cell with mosquitos and a sponge mattress on the floor.
 - f. Watts said at the station Burns was very emotional and crying, she had gone there to see another client, was asked to check up on Burns by her good friend his aunt on St Kitts, he was not her client, he never told her of suggested immunity, and she did not say she would ask the DPP about it, but instead later at the magistrates court did ask the DPP about bail while present representing another. She had no conversation about Burns with Laborde, who is her brotherinlaw, nor ever sent a text suggesting Burns cooperate.
- 6 Broadly, as findings of fact, I am sure I can wholly rely on Counsel Watts, I am sure Burns has not been reliable as to what he told the court happened nor in particular as to what he told Watts at the station, but also, I am not sure I can rely on all I have been told by the police

witnesses. Something caused Burns to confess. There is no detailed custody record to show who spoke to Burns when or where. In sum, I find it cannot be ruled out Burns was encouraged to consider his position as an athlete and cooperate, with mention the police would 'do their best' not to prosecute him, which in his emotional state post-charge he misunderstood as a promise, which it was not, but which the police anticipated was a mistake he might make.

- 7 The question arises whether exploiting he would make a mistake in emotion, if it reasonably may have occurred, is ground for excluding the confession.
- 8 There are two sources of law to consider concerning admissibility of confessions: the **Judges' Rules 1912 (as amended 1964)** and **UK Police and Criminal Evidence Act 1984**, the former in force locally, and the latter persuasive in the Commonwealth.
- 9 Turning to the **Judges' Rules**, they read that:

Principles

These rules do not affect the principles...(e) that it is a fundamental condition of the admissibility in evidence against any person equally of any oral answer given by that person to a question put by a police officer... that it shall have been voluntary in the sense that it has not been obtained from him by fear of prejudice or hope of advantage, exercised or held out by a person in authority, or by oppression.

The principle set out in paragraph (e) above is overriding and applicable in all cases. Within that principle, the following Rules are put forward as a guide to police officers conducting investigations. Non-conformity with these rules may render answers liable to be excluded from evidence in subsequent proceedings.

Rules

3 (b) It is only in exceptional circumstances that questions relating to the offence should be put to the accused person after he has been charged...Such questions may be put where they are necessary for the purpose of ...clearing up an ambiguity in a previous answer...Before any such questions are put the accused should be cautioned...

3 (c) When such a person is being questioned or elects to make a statement a record shall be kept...

- 10 In this case, analysing how the Rules may apply, though post charge, the evidence is after contact with Counsel Watts, though she says not on her advice, Burns elected to make a statement, 'for the purpose of clearing up ambiguity' as to his previously making no comment, meaning such answers were ambiguous as to whether he is guilty or not. The 'exceptional circumstances' were Burns wanted to protect his position as a sportsman as best possible, which he saw as by electing to make a confession statement in the belief this would help his future. A 'record' was then 'kept'. On this analysis, under the **Judges' Rules** his third interview was permissible.
- 11 The question now becomes, why did he think confessing would help. The answer is he may have believed this would allow the police to 'do their best' to make him a Crown witness. In this context, his confession was wholly 'voluntary', in that he was wanting to tell the truth to help the police to help him, because as a truthful person he could become a Crown witness, where his truthfulness determines whether he can be used by the Crown.
- 12 The question now becomes, under the **Judges' Rules**, did he confess 'in the hope of advantage...held out by a person in authority'? Here lies the rub.
- a. The answer is no, because on the evidence I am sure no police officer 'held out' categorically he would be a Crown witness. Instead, Burns made a mistake, thinking that doing their best was a promise.
 - b. But if someone promises to make you rich, this is obviously different to doing their best to do so. If he had been calmer perhaps he would not have made this mistake. But it is not the fault of police he was emotional, nor should they be unable to take advantage of mistake, assuming they have not misled, which does not follow if they said they would do their best, clearly implying the decision not to prosecute was not theirs to make.
 - c. Moreover, I find as a fact I am sure there was no text from Watts to cooperate shown by Laborde; and further there was no fabrication of a text by him with Murrain which would otherwise be a conspiracy to pervert the course of justice which I am satisfied in this case

did not arise. I make this finding on all I have heard, mindful I have found the evidence from Burns to be unreliable, particularly in view of how Watts contradicts him.

- d. In addition, it is evident Burns was calm during interview, whatever his disquiet earlier.
 - e. It bears emphasizing a police station is not a sociable place, with easy talk and bonhomie. Police are trying to catch criminals, who understandably are trying to avoid being caught. Almost all times an officer speaks to suspects they are cautioned and told they do not have to say anything but what is said will be recorded and may be given in evidence. There are notional 'flashing red lights' above everything a suspect does and says in a police station. And before his confession, Burns was reminded of the caution, and told police he knew this meant he did not have to say anything. He knew making admissions was significant and they could be used against him.
 - f. Let it be said so suspects do not misunderstand, talking to police is a serious matter, with consequences, in a pressurized place, wherein *caveat confessor*.
- 13 Reviewing the facts, I am satisfied (if it may reasonably have occurred) police did not make Burns make a mistake, but it may be they did assess he might make one and let him do so, which in my judgement is permissible, particularly where, as here, the confession is true.
- 14 Turning to **ss76 and 78 Police and Criminal Evidence Act 1984**, these read:

76 Confessions.

- (1) In any proceedings a confession made by an accused person may be given in evidence against him in so far as it is relevant to any matter in issue in the proceedings and is not excluded by the court in pursuance of this section.
- (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 him in consequence thereof,

the court shall not allow the confession to be given in evidence against him 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.

78 Exclusion of unfair evidence.

(1) 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.

(2) Nothing in this section shall prejudice any rule of law requiring a court to exclude evidence.

- 15 Under *s76 supra*, a confession will be excluded if possibly arising from oppression or in circumstances making it unreliable. However, in this case, neither arises, and indeed Burns has said the confession is true. Under *s78 supra*, the circumstances in which the confession was obtained were arguably Burns was assessed likely to make a mistake, and did so, wrongly thinking the police 'doing their best' meant a promise not to prosecute; however, as above I consider this permissible in the eternal contest between police and suspects, and the admission of the confession into evidence before the jury will not have 'an adverse effect on the fairness of the proceedings' as it is true. Thus neither section would lead to ruling it out.
- 16 Of further interest in a review of the **1984 Act** is how the emphasis is not on whether an interview is 'voluntary' but 'reliable', reflecting on how the law has developed more widely since 1912. A reliability test here puts the admissibility of the interview beyond argument.
- 17 Counsel Cassell relied upon **R v Thomas, Meerabux and Seales 1961** 3WIR 539, where Meerabux' admissions were excluded from a third interview, during a third day in custody, where to secure his confession a secret recording of his admitting the offence with a co-defendant six days earlier was played. Though Gomes CJ opined the confession had been 'involuntary' to secure bail, the case is distinguishable as the incriminating recording was withheld while in custody and sprung on Meerabux, unlike here where all the evidence had

been explored in Burns' earlier no comment interviews. Counsel Cassell further relied on **R v Croydon JJ exp Dean 1993 3AER129** in which Dean had been told categorically he would be a Crown witness, and so later proceedings against him were quashed, but is distinguishable because on the facts here there was no categoric promise, express or implied.

- 18 In sum, Counsel Cassell has made two submissions: first, the confession was improperly induced and excludable as involuntary; and second, because of a categoric promise to make Burns a Crown witness the proceedings ought to be stayed for abuse of the court's process.
- a. The test for the first is whether I am sure it wrong, and I am, in the sense I am sure there was no improper inducement; instead there may have been a mistake by Burns which is not the same.
 - b. The test for the second is whether on balance abuse arises, which would always be a rare outcome, and I am satisfied abuse does not arise as the confession, as above, was not improperly induced; and even if it was may not always automatically lead to a stay if true, though I do not need to decide this.
- 19 The broader point in the defence seeking to exclude a truthful confession is to safeguard suspects from police trickery, which for public policy reasons it is more important to prevent than to secure convictions. It might be said the police letting Burns make a mistake is up to the line, but in my judgment it is not over it, but would be if they made him make the mistake, which may not always be an easy line to draw.
- 20 I appreciate this ruling will be a most unhappy outcome for the defendant Shernyl Burns, whose career in cricket may turn on this trial. However his confession he has been carrying drugs for his uncle in KFC buckets returning from cricket in Antigua to Montserrat will be heard by the jury. Moreover, it will not be permitted for the Crown to put into evidence before the jury he has said his confession true on the *voir dire*. If Burns gives evidence, it may be he can be asked this under cross-examination, though subject to Crown application and defence response.
- 21 I thank counsel for an intelligent argument, on a well-presented *voir dire*, by both.

The Hon. Mr. Justice Iain Morley QC

High Court judge

19 May 2021