

IN THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

ON ANTIGUA & BARBUDA

CASE ANUHCR2018/0150

REGINA

V

PC & CJ¹

APPEARANCES

Mr Curtis Cornelius for the Crown.

Mr Lawrence Daniel for PC.

Mr Pete McKnight for CJ.

2019: NOVEMBER 12

NOVEMBER 13

RULING

On the late admissibility of a 911 audio recording

- 1 **Morley J:** On 12.11.19, I have ruled admissible a 911 audio recording produced late during jury trial. I have promised written reasons, which are these.

¹ As both were later acquitted, neither they nor the complainant will be identified.

- 2 The defendants PC and CJ face allegations of indecent assault and unlawful confinement, in that on 07.01.18 at about 03.00 they were in a silver Subaru when Ms PF (whose car unknown to them had run out of petrol), near Wendys club asked for a lift to Diamond Ice club, both venues being associated with what counsel and PF have described are 'ladies of the night'. The allegation is once in the car she was taken against her will to Five-Islands, asked how much for sex, was groped about the breast and vagina, and when she refused, and complained, she was taken back into St Johns to a taxi, immediately making a police complaint by a 911 call.
- 3 During PF's evidence, she complained most of the driver (PC), saying the passenger (CJ) had been telling him to let her go, though added the passenger had at one point touched her too. During cross-examination of the 911 operator, who reported a call had been received, Counsel Daniel defending, established there was a digital recording which had been given to police, and Counsel McKnight, also defending, established the complaint had been about only one, not two. During cross-examination of IO PC Robins, various shortcomings in the investigation were drawn out, including that PF initial complaint had been jotted into a diary, now lost, and that PC and CJ had been interviewed to make a statement under caution on 08.01.18 which was the day before any statement was taken from PF.
- 4 Against this background, IO Robins was tasked with obtaining the 911 recording and his diary, and found the former. Playing it, PF is coherent, not evidently drunk or hysterical, making complaint on the taxiphone within moments of being dropped that she had been 'felt up over her whole body' by both defendants, correctly naming one as 'P'. Application has been made to play it to the jury, resisted by the defence.
- 5 On the one hand, the 911 call might be said to be inadmissible as a self-serving statement, a species of documentary hearsay, and ought not to be allowed in evidence as it was produced so late. On the other hand, it is evidence of the apparent sobriety of PF, complaining so immediately to the events (being as soon as she is out of the car at the taxi stand) that it is tantamount to the *res gestae*², at the very least may be permitted under the doctrine of recent

² See Blackstones Criminal Practice 2017 para F6.45.

complaint to show consistency, while it permissibly corrects an impression she only really ever complained about PC and from the defendants' police interviews she was 'drunk or high'.

- 6 The defence argue the 911 call has not been properly provenanced, as to who received the recording, and where it has been stored, but this can be cured by PF returning to court to listen to it, on a voir dire, to speak to it being her call, and if so, can then give the evidence to the jury identifying herself on it.
- 7 The call audio is 'real evidence', being something physical from the event, allowing the jury to listen in to the evening, recorded simultaneously, rather than a record made after. It captures her voice, and complaint, and has impact. To the mind of the jury, it may well have the ring of truth about it. It is not muted or sterilized by dry police statement procedures. It has vibrancy. It presents a compelling glimpse of the drama. The defence are rightly worried it may convict both, and complain the case had been going well, so it seems unfair their progress might now be undone. Such is not a reason for inadmissibility. The call is potentially highly probative of the truth of the allegation, supporting the credibility of PF, and her accuracy, and consistency, correcting wrong impressions, all of which outweighs the possibly prejudicial effect of it being admitted late. Moreover, the defence have not pointed to how they would have conducted their case differently if the call had been earlier available, arguing instead, and merely, the case has been prepared on the basis there would be no 911 recording, yet this begs why did Counsel Daniel ever ask whether there was one if he did not want to risk it being produced. There is a well-known rule that in cross-examination it is usually wise not to ask questions to which you do not know the answer, which has here been broken, with consequence.
- 8 The call is relevant probative evidence and shall be admitted if identified by PF.

The Hon. Mr. Justice Iain Morley QC

High Court Judge

13 November 2019