

IN THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

COLONY OF MONTSERRAT

(CRIMINAL)

A.D 2016

NO. MNIHCR2013/0008

REGINA

V

ORIN EVANS

APPEARANCES:

Mr. Oris Sullivan with Mr. Kenroy Hyman for the Crown

Mr. David Brandt for the Accused

2016: NOVEMBER 23

RULING ON THE ADMISSIBILITY OF THE EVIDENCE OF PC GILFORD

***Concerning how to approach a police notebook with incriminating material
alleged to be said by a defendant but not shown to him***

[1] **MORLEY J.**, I am asked to rule on the admissibility of the evidence of
PC George Gilford.

The facts

- [2] The defendant is charged with murder. On the night of 3 October 2012, he killed his friend and landlord Aubury Barry in Manjack. Barry lived above Evans. Barry died from several blows to the head from a hammer. The prosecution say there was a dispute about rent. Evans says Barry, unannounced, let himself into his pitch-black apartment close to midnight, leading him to believe he was being burgled and attacked, so that in the dark he attacked the intruder pre-emptively in self-defence, beating him with a piece of wood and a hammer, only to learn on turning on the lights it was Barry.
- [3] There have been two previous trials, in 2013 and 2015, in which he has been convicted, and acquitted on appeal in 2014 and 2016. The admissibility of what Gilford says has not been argued before. Gilford gave evidence on a *voir dire* before me, on 22.11.16, and further on 23.11.16.
- [4] Immediately after inflicting the injuries, (from which Barry later died in Barbados while receiving medical attention), Evans went to the police station in Brades, arriving 00.10, and told PC Washington he believed he had killed a man saying, *'me see a man breaking in me house and me kill he'*, showing the officer blood on his hands. He was arrested and cautioned on suspicion of murder. The words of the caution are: *You are not obliged to say anything unless you wish to do so, but what you say may be put into writing and given in evidence*. In reply to caution he said, *'just make sure me family ok, dem no have nothen to do with dis'*. He was placed in cell 3.
- [5] PC Gilford was summoned from Salem police station as there was now a prisoner in the cells, there was only WPC Newell on duty in addition, and PC Washington set off to visit Evans' home to see what had happened. He had by then been a police officer for 3 years.

- [6] On arrival, PC Gilford went to Evans to inquire if he was ok. There followed from 00.40 a contentious 4/5mins conversation, recorded in Gilford's notebook as at 04.10.16 at 00.55, which Evans denies occurred. The note reads as follows:

Information. I have spoken to Orin Evans of Manjack who was arrested on suspicion of committing murder, the conversation was while down in the cell after Orin stated to me after I inquired if he was ok, that we must secure his family and ensure they are ok. He asked if they will be sent back to Jamaica, and I told him not to worry about them, they will be ok. He told me if we found Aubrey, and I told him that officers went to the house. I told him you don't have to say anything but what happen (sic). Orin told me that while he was in the house someone broke in and he took a hammer and started to hit the person in the head. He then told me when he gave the person the first hit with the hammer the person fell and that after the third hit with the hammer he realised who it was. I asked him who was it, and he told me Aubrey. He then went on to say he just continued hitting him now with a piece of wood. He said that he thought that he was dead, so he took the car keys from him and left him in the house. Orin went on to tell me make sure we secure his family. I then told him to relax himself. Orin did not look at this time as if he was scared.

- [7] There followed a second conversation from 01.04, recorded at 01.25, though less contentious:

Information. While filling out a custody form for Orin Evans in the cell area, and telling him of his rights, he told me to please get in contact with his family. I told him he has the right to a solicitor/lawyer and he said he cannot afford one and he does not want one. He asked me if the court will provide one and I told him I'm not in a position to let him know whether that will be

possible. He asked me if Aubrey died and I told him I do not know. He asked me if we found his car, and I told him yes. I asked him if he gave the keys to the officers and he told he through (sic) the keys away. I asked him where did he through (sic) them and he does not know where. I asked him why did he park it there and he said he just park there. He said he was going to tell his mother about what happen (sic) but he change (sic) his mind as to how it might affect her. He said when he left Aubrey house he drove up Baker Hill where his mother lives but he did not stop, and then drove to the station. I told him of all of his rights and he did not say anything else.

[8] The next notebook entry is untimed for 04.10.12, and it reads:

Duty. I passed on the information to Inspector Williams at the scene of the crime.

[9] In the *voir dire*, Gilford said he had travelled to the scene of the crime to pass on the information as he realised it was important, and had realised it as he was receiving it from Evans, which is why he had written it down.

[10] Evans was interviewed on 05.10.12 from 09.30 by Q&A, concluding at 12.15 on 06.10.12, in which each question was written down by Inspector Kirwan in his presence, and then his reply, signed for by Evans, and throughout he mostly said '*my lawyer told me not to answer any more questions.*' His lawyer, David Brandt, also his counsel at trial, had been present at first, but then left, leaving him to face questions alone, over an indistinct period. In Brandt's absence, Gilford recalls being present in the interview with Inspector Kirwan and reading to Evans the contents of his note, about which there is no entry in his notebook, nor counter-signature by Kirwan.

[11] In the *voir dire*, Gilford appeared not to know whether he had an obligation to present his note to Evans for signature and for correction. When he had returned at 01.04 on 04.10.12 for the second conversation, he had with him his notebook, in which the first conversation had just been recorded upstairs away from Evans in the Inquiries room, and nevertheless he did not alert Evans to how he had just made a note of the first conversation, nor present his notebook which was to hand.

[12] This ruling does not make criticism of the good faith of the officer, notwithstanding that Evans denies the incriminating conversation.

[13] The potentially damaging evidence is in the first conversation, and in particular:

I told him you don't have to say anything but what happen (sic). Orin told me that while he was in the house someone broke in and he took a hammer and started to hit the person in the head. He then told me when he gave the person the first hit with the hammer the person fell and that after the third hit with the hammer he realised who it was. I asked him who was it, and he told me Aubrey. He then went on to say he just continued hitting him now with a piece of wood. He said that he thought that he was dead, so he took the car keys from him and left him in the house.

[14] Further evidence was sought from Gilford as to what he meant by writing '*but what happen*'. He said that he had used 'but' for 'about', notwithstanding he uses the word 'about' properly both before and after this sentence, and there are no other examples in his notebook of mistaking the use of *but* for *about*. However, he explained he corrected this error of meaning in his statement of 10.10.12. The first time the error has been brought out in public is today, and it has not been drawn to any

other person's attention at the police station or otherwise. He did not correct the word 'but', as he has corrected other words elsewhere, as the note had been finished, while other corrections had been while writing. However, he is quite sure the word is wrong, it should be 'about', he was quoting his own pronunciation of the word 'about' as 'but': so that the sentence does not mean, as he accepts it reads, that he began to question Evans, asking, *what happened?* For the purposes of this ruling I accept what he says, and therefore that he did not question Evans as to events.

The argument

[15] In Montserrat, the operative guidance on the application of a caution and the exclusion of evidence arising if not administered derives from the Judges' Rules of 1906. Montserrat is a British overseas territory. In England and Wales, the Police and Criminal Evidence Act 1984 (PACE), with its attendant codes of practice, replaced the Judges' Rules, partly to prevent what used to be called 'verballing' under the Judges' Rules, which was where an officer would mischievously record in a notebook what he ascribed to a defendant without the note being signed as true, and offering the mischief as evidence supported by the imprimatur of his or her authority as a police officer. However, PACE is not in force on Montserrat.

[16] Turning to the Judges Rules, they read that:

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.

Rule 2. As soon as a police officer has evidence which would afford reasonable grounds for suspecting that a person has committed an offence he shall caution that person.

Appendix B 1(a). When possible statements of persons under caution should be written on the forms provided for the purpose. Police officers notebooks should be used for taking statements only when no forms are available.

Rule 4 (d). Whenever a police officer writes the statement he shall take down the exact words spoken by the person making the statement.

Rule 4 (e). When the writing of a statement by a police officer is finished, the person making it shall be asked to read it and to make any corrections, alteration, or additions he wishes. When he has finished reading it he shall be asked to write and sign... on the following certificate at the end of the statement: "I have read the above statement and I have been told that I can correct alter or add anything I wish. This statement is true. I have made it of my own free will."

Rule 4 (f). If the person who has made a statement refuses to read it or to write the above-mentioned certificate at the end of it or to sign it, the senior police officer present shall record on the statement itself and in the presence of the person making it what has happened.

[17] In argument, the defence have said:

- a. There is nothing to show the note is accurate as it is not signed nor was it shown for correction to Evans.
- b. Gilford had his notebook on him at the cell door and could have recorded the conversation contemporaneously (though Gilford said he could not as he had to 'keep his eye' on the Evans).
- c. It sits at odds with how it is said Evans withheld information from Washington, for example about who had been killed and where, and yet is supposed to have spoken freely to Gilford, who he did not know, suggesting there may be no truth to the unsigned note.
- d. If truly volunteered, in theory therefore Evans would have had no difficulty signing the note as correct, which may suggest therefore it was not offered for signing as it was not true.
- e. If Gilford thought it necessary to give Evans some sort of caution, as in his notes, which show a 'half-caution', he was duty bound, and knew, he had to give the full caution.

[18] In argument, the prosecution have said, and I observe:

- a. PACE and the codes of conduct have no application on Montserrat – to decide this matter, I do not need to consider PACE and its codes, but can decide it directly on consideration of the Judges' Rules. However, I make the observation, as *obiter dictum*, that there may be at some future date in some future argument in some future case fuller consideration of the extent to which PACE and the codes, though arguably not binding, may nevertheless provide guidance, as indeed was conceded by the prosecution, and I quote, that PACE and the codes, while not being a rule of law, '*can be used for administrative guidance*'.
- b. Evans had been cautioned by Washington, and therefore he was under caution when Gilford spoke with him – I reject this submission, as Rule 2 expresses the need in mandatory terms that a police officer *shall* caution before putting any questions, which plainly means the questioning officer, being here Gilford, if there are reasonable grounds

for suspecting an offence, which there were plainly as Gilford was aware Evans had already been arrested on suspicion of murder.

- c. In addition, Gilford 'half-cautioned' Evans by saying Evans did not have to speak to him, which is good enough on its own as the addition of the words, '*but what you say may be put into writing and given in evidence*' is academic, in the sense that the point of the caution is to say that nothing need be said, which was said here – I reject this submission, as the simple fact of the rider implies it is not academic, as if it was it would not be there. In addition, it is self-evident, and was conceded by the prosecution in argument, that a warning what you are about to say will be reportable, as with journalists, makes a person more cautious, as the caution intends. It follows that there was no 'half-caution'; instead, the correct position in law is that there was no caution given, when there should have been.
- d. The only time the note of what was recorded as said need be alerted to a defendant should be by advance disclosure on formal interview, or at court – I reject this submission, as I find that what is in the notebook is a 'statement' within the Judges' Rules, and therefore is required under Rules 4 (d-f) to be offered to Evans for signature, alteration, and correction, and if he refused to cooperate, then this should be recorded in the notebook, by a senior officer, none of which happened here. The purpose of this provision is to ensure accuracy of record of what was said, which can self-evidently easily go awry where an officer purports to record accurately a 4/5 min conversation, not at the time but afterwards and alone, as here - while in evidence before me, for example, Gilford could not recall the first question I asked him within three minutes of my asking it.
- e. The only question for the court is whether what was said was 'voluntary', as per *R v Prager 1972 1 AER 1114* – I reject this submission, because *Prager* is authority for how a judge may in his or her discretion admit a confession made voluntarily though without caution, which is not the same as *must* admit it, meaning the discretion to exclude, as articulated by the Judges' Rules, persists.

- f. If a defendant denies there was ever a conversation, as here, then the issue is not the voluntariness of the statement, but whether anything was said, which is a jury question, and automatically admissible per the case of *Ajodha v The State of Trinidad and Tobago* 1981 2 AER 193 – I reject this submission for three reasons.
- i. Firstly, the case of *Ajodha* is distinguishable as it concerned statements which had been signed as true, but were said to have been beaten out of defendants, which is not this case where there is no signature.
 - ii. Secondly, in any event, if the prosecution is correct, there would be a liar's charter in that it would mean that no fabricated admissions, being always denied, could ever be challenged as to admissibility.
 - iii. Thirdly, voluntariness is not definitive, it is instead 'overriding' and its absence means inadmissibility; not the reverse, namely that its presence means admissibility. Instead if voluntariness is present, then the question arises whether the Judges' Rules have been followed, and if not followed, inadmissibility may arise, notwithstanding that a statement may be voluntary, for want of proper application of the caution, as here.

[19] Finally, I must consider a middle-ground position. It can be intelligently argued, and was discussed, that the caution only really became necessary at the point in time that Evans had begun to *volunteer* information about striking with a hammer, (it being accepted for the purposes of this ruling he was not asked what happened); so that instead of interrupting the volunteered narrative by asking 'who was it', at that point Gilford ought instead to have interrupted the narrative by administering a full caution under Rule 2, because 'evidence' was emerging to suspect an offence: this would mean all that might fall foul of the need for a formal caution is the *later material* in the lines:

He then went on to say he just continued hitting him now with a piece of wood. He said that he thought that he was dead, so he took the car keys from him and left him in the house.

[20] I find this argument attractive. The reason is that there are indicia that the *earlier material* is true, in that Gilford would probably not at 00.55 on 04.10.12 have known of a hammer, so that this information as recorded in the notebook plausibly comes from Evans. The precise *earlier material* is:

Orin told me that while he was in the house someone broke in and he took a hammer and started to hit the person in the head. He then told me when he gave the person the first hit with the hammer the person fell and that after the third hit with the hammer he realised who it was. I asked him who was it, and he told me Aubrey.

[21] The short point is this. Gilford knew a caution was needed as the conversation evolved. This is why he offered a half-caution, which I have found is not a caution. The prosecution concede a proper caution ought best have been given, but suggest that any breach of the Judges' Rules was not so significant to render the possibly incriminating features of the statement made by Evans inadmissible because there was already in place a caution from Washington, and the Gilford half-caution was the essence of a caution, (the wording about reducing what is said to writing being academic). For the reasons outlined above I have rejected this argument. A full caution came to be needed. Moreover, testing the accuracy of the note did not occur by giving it to Evans to review and sign. By not cautioning him and not showing him the note, inadvertently, the evidence of Gilford risks running 'a coach and horses' through the safeguards of the Judges' Rules, and offering inaccurate and wrongly-gathered evidence whose impact is in my judgement more likely than not to be more prejudicial than probative.

[22] However, as articulated in *Prager*, I have a discretion. Notwithstanding the breaches of the Judges' Rules, in that there should have been a proper full caution, I consider that what I call the *earlier material* was volunteered, and is admissible, but that there came a time after mention of the hammer that the full caution was fundamental to the rights of Evans, so the *later material* is to be excluded.

[23] In the circumstances, in my discretion, I do find that the breaches are significant, and within the Judges Rules do render the *later material* inadmissible at a certain point in time, as regards the first conversation. Therefore I rule that the following is inadmissible:

He then went on to say he just continued hitting him now with a piece of wood. He said that he thought that he was dead, so he took the car keys from him and left him in the house.

[24] Aside from the *earlier material*, all other material in the notebook is admissible as volunteered and not particularly prejudicial nor particularly probative, as may be sought by either party.

The Hon. Justice Iain Morley QC

High Court Judge