IN THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

ON ANTIGUA & BARBUDA

CASE ANUHCR 20018/0042

REGINA

V

GH

APPEARANCES

Mr Adlai Smith for the Crown.

Mr Kendrickson Kentish and Mr Everton Gonsalves for the defendant.

2018: OCTOBER 11

OCTOBER 19

RULING

On the admissibility of a confession following alleged inducement

1 Morley J: I am asked to rule on the admissibility of a confession following alleged inducement. A *voire dire* was conducted on 11.10.18, when I also heard argument, and this is the ruling which follows.

2 The defendant GH is charged on indictment concerning a complainant, KG[1], with two counts of rape and in the alternative with two counts of having unlawful sexual intercourse with a girl under

[1] The complainant KG will not be named as she is entitled to anonymity as the case concerns sexual offences, while the defendant GH is not identified because the case is yet to be tried.

16, respectively being events in March 2014 when KG was 14 and he 29, and October 2015 when 15 and he 31. On the prosecution case, KG fell pregnant by him and he procured pills to cause a termination in November 2015, which made KG ill, so that upon medical intervention what had happened with GH was formally reported to police by KG in a statement dated 05.12.15. GH was arrested for rape and procuring a miscarriage sometime around 16.00 on 07.12.15, and at St Johns police station in a statement under caution at 16.43-17.05, and then in answer to questions at 17.31-19.50, he denied any sexual contact with KG, (to be called interviews 1 and 2 in this ruling).

3 It appears GH was kept at the police station in a cell thereafter. He had no lawyer, though agrees he was told he could ask for one. On 09.12.15, he again made a statement under caution at 16.44-16.57, and answered further police questions at 17.20-17.55, in which he admitted consensual sexual intercourse, denied rape, and denied obtaining the miscarriage pills, (to be called interviews 3 and 4 in this ruling).

a. In interview 3, he said:

> *'Me and KG we did have sex. I didn't rape her. She give it to me wilfully. When it happen I told her it does not feel right because she is my baby mother sister and me nah know if she get pregnant. Me know me use a condom and it did burst. I had no idea she was pregnant because after what happened, we stop speaking to each other…Me believe it was sometime in ah the ending of August or September 2015. This happen about three weeks to a month after me come back from Jamaica'.*

b. In interview 4, in answer to questions he said:

> *Q This statement that you give me on 09.12.15, are the contents true and correct?*
>
> *A Yes sir, it is true and correct.*
>
> *Q Did you give that statement of your own free will?*
>
> *A Yes sir I did.*

Q Were you promised anything by any one, beaten by anyone, or threatened by anyone to give that statement?

A No sir I was not.

Q Did you signed that statement?

A Yes sir I did

Q Were you forced to sign that statement?

A No sir I was not.

Q Why did you choose to give that statement on 09.12.15, after you would have already given a statement in the same allegation on 07.12.15?

A Because me feel ah time fu me tell the truth because me clean and honest.

Q In the first statement you gave to the police on 07.12.15 in this same allegation were the contents of that statement true and correct?

A 90% of that statement is true except for the part where me say me never have sex with KG…

Q You said in your last statement KG gave you the sex wilfully, why would she say you raped her?

A I don't know why she say that, maybe it's because me stop talking to her.

Q How old is KG?

A About 15, 16.

4 The primary interviewing officer for all four interviews was Cpl Lavia. Interviews 3 and 4 were witnessed by PC Rose, who on the *voire dire* was unable to assist with whether Lavia had spoken to GH beforehand, so that her evidence was neutral.

5 It is apparent that in interviews 3 and 4 GH appears to have confessed to at least one incident of unlawful sexual intercourse.

6 However, on the *voire dire*, GH gave evidence that interviews 3 and 4 were not true, and had been induced by Lavia promising him bail if he made admissions.

7 He described how, not having experienced arrest and detention before, he had been placed in a cell with no toilet or lights, known as the 'stinky cell', where he had to attend without dignity to his needs at a drain. Over time, Lavia would look in on him and seemed friendly.

8 After two days in the cell, he was taken alone to a room by Lavia who told him: *'Mr GH, these are some serious allegations made against you, it does not matter if you did it or not, your name was called, and you will be going to jail on remand for a very long time, but if you say you did it, I will speak to the prosecutor, who will work with the judge, so you will not have to go to jail, but you will have to go to court.'* As a result, GH, as he put it, *'just told him a story'*.

9 In evidence on the *voire dire*, Lavia denied he ever said such things.

10 Following charge, later at the Magistrates Court, before Magistrate Wason, bail was denied, and GH found himself on remand for seven weeks until 01.02.16, when he finally secured bail at the High Court. GH said at the *voire dire* that before the Magistrate when first at court upon bail being denied he burst out to Lavia, who was in court, *'you promised, you promised!'* before being bundled away to the cells. Lavia denied this occurred.

11 In strong submissions from Counsel Kentish, I am told that precedent says that unless I am sure there was no inducement, I must exclude interviews 3 and 4, even if their content is true. In other words, if there was, or may have been a promise of bail, any confession is inadmissible.

48 hours

12 *Obiter*, a point needs addressing concerning how long GH was detained. At one point in argument, raised by the Bench, it seemed clear interviews 3 and 4 were more than 48 hours after detention.

13 Article 5.5 Constitution of Antigua & Barbuda says:

> *Any person who is arrested or detained…(b) upon reasonable suspicion of his having committed or being about to commit a criminal offence under any law, and who is not released shall be brought before the court within forty-eight hours after his detention and, in computing time for the purposes of this subsection, Sundays and public holidays shall be excluded.*

14 During evidence, Lavia admitted he may have lost track of the amount of time GH had been in custody, so that he had not been aware the 48 hours was up before interviews 3 and 4. It was only after close analysis of an online calendar for Antigua, suggested by the Bench, that counsel prosecuting and defending realised that 09.12.15 had been National Heroes Day, and therefore a public holiday, so that technically the 48 hours had not expired.

15 The 48 hour rule is a constitutional right. Investigating officers must have the time limit in mind at all times. Had the time expired, the presumption should be that any interview after would be inadmissible, which the prosecution would have to rebut, probably with difficulty, as there would have to be very good reason to keep someone longer, in breach of constitutional right, without bringing the administration of justice into disrepute, (noting here the evidence was that, unsatisfactorily, the officer seemed to have lost track of the time). In this case, but for the public holiday, I would have excluded interviews 3 and 4 as out of time.

What happened

16 In considering exclusion for inducement, to resolve the questions raised on this *voire dire* inevitably requires the court to make findings on what happened, (which will be separate to any findings by a jury, and who will not be informed of these).

17 The first question is, were the words in para 8 said by Lavia? I am sure they were not. The reasons are:

a. Lavia denies them.
b. Complaint was not made by GH to the Magistrate of what had supposedly been promised, at any time, at any appearance, suggesting there was no promise as described.
c. GH specifically said in interview 4 he had not been promised anything.

d. To explain why he did not refer to the promise of bail in interview GH said under cross-examination, for the first time, Lavia had told him specifically not to say, which was new evidence, not elicited in chief, by senior and able Counsel Kentish. It was plain therefore this had not been known to his counsel, as otherwise it would have been elicited, suggesting, given its importance, GH was making this up in the witness box (or his counsel would have been informed earlier), and if this, then all of it.

e. As a practicality Lavia could not have promised bail, as it was a decision for the Magistrate, so making such a promise would likely raise a hue and cry, as would be predicted by Lavia, making it unlikely it was made.

f. To my mind, whatever else might be said, it is highly improbable any police officer would ever actually say *'it does not matter if you did it or not'* and that all that was important was that *'your name was called'*, so that these words seem clearly not correct, indicating neither is the rest.

18 In theory, this finding could bring to an end this legal inquiry, and interviews 3 and 4 could simply be ruled admissible. However, before reaching a final adjudication there are other features to explore.

What is an inducement?

19 The discussion in court has raised what is an inducement?

20 Close analysis suggests an inducement must be deliberate and operate on the mind of an accused substantially to cause his will to crumble so that he speaks when he otherwise would have remained silent.

21 Under the **Judges' Rules 1906**, no statement by an accused is admissible in evidence against him unless it is shown by the prosecution to have been a 'voluntary' statement in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority, per Lord Sumner in Ibrahim v Regina 1914 AC 599.

22 In Peart v Regina 2006 UKPC 5, the Judges' Rules were held to be administrative directions, not rules of law, though they do possess considerable importance as embodying the standard of fairness which ought to be observed. Judicial power is not limited or circumscribed by the Judges Rules. A court may allow a statement to be admitted notwithstanding breach, and conversely may refuse to admit it even if within the rules' terms. The criterion for admission is fairness. The voluntary nature of the statement is the major factor in determining fairness. If not voluntary it will not be admitted; if voluntary, that constitutes strong reasons in favour of admitting it, notwithstanding a breach of the rules, but the court may rule that it would be unfair to do so even if the statement was voluntary.

23 Emphasis was placed by Counsel Kentish on Sparks v Regina PC appeal 16 of 2003, in which a man was induced to make admissions to doing a thing he could not remember. However, in this case, GH could be expected to remember whether he had sex with KG, so that the Sparks case is distinguishable.

24 Support for para 20 may be found in Melanson Harris et al v Regina criminal appeals 5 and 10 of 1996, where Singh JA said:

> 'Oppressive questioning [*and by analogy inducement*]…by its nature, duration or other attendant circumstances, including the fact of custody, excites hopes (such as the hope of release) or fears, or so affects the mind of the suspect that his will crumbles and he speaks when otherwise he would have remained silent. The test is highly subjective and would appear to embrace almost any words and/or actions which are calculated or likely to weaken the mind of the accused to whom it is addressed to undermine his will.'

25 Moreover, per the Oxford dictionary, an inducement is *'a thing that persuades or leads someone to do something'*. 'Fear of prejudice' and 'hope of advantage' are capable of being an inducement, in the sense that either might be a thing to persuade or lead a person to do something.

26 However, a distinction needs to be drawn between potential and actuality. An inducement only is if it persuades; it is not if it might but in fact does not. Moreover, it must be 'exercised' or 'held out' by a person in authority, each of these words importing specific intent. In other words, in order to be an inducement, a police officer must intend that he will use fear or hope to persuade a person to confess, and who then does confess because his will substantially crumbles in the fear or hope deliberately created by the officer. To qualify as an inducement, it must be deliberate and it must operate on the mind. It follows:

a. It is conceivable a person may confess mainly because it is in conscience the right thing to do, without his will crumbling, notwithstanding pressure created by an officer trying to raise fear or hope, so that if so, that would not be a qualifying inducement as it did not operate to crumble the will; and

b. It is conceivable a person may confess in fear or hope which is a misunderstanding and was not intended to be raised by the officer, so that if so, that would not be a qualifying inducement either as it would not have been deliberate.

27 The scale of the inducement is worth considering. At one end of the scale could be: *confess or you will be shot*. In such a case, if proven, the confession would rightly be excluded, even if true, in relation to any crime, for the obvious public policy reason that police officers should not be allowed to threaten to kill citizens. At the other end of the scale could be*: confess or you will not get ice cream*. In such a case, in theory if proven, namely that the confession only arose because of a fear of no ice cream (for example possibly because an accused is vulnerable or mentally ill, craving ice cream), then it remains a qualifying inducement, which under the Judges' Rules would mean exclusion of a confession as involuntary. But the reality is, on analysis, it would be unlikely that a confession to a serious crime would really revolve around a threat not to get ice cream, if a person is not vulnerable, so that a court might be expected to find there was in fact no qualifying inducement, as in para 26a, as it did not operate to crumble the will, notwithstanding there was or may have been a threat of no ice cream.

28 In short, the more minor the threat or hope offered, the less likely it would operate on the mind, so that it would not be a qualifying inducement. A court must always look at whether an inducement qualifies, because it has to persuade, and so substantially to crumble the will, and if it does not, then it has not operated on the mind and so is no inducement. So, it is not enough for a defendant at trial simply to show something may have been said; the court must enquire if it mattered.

29 Let us now imagine the impugned words were said. In this case, GH argued he was promised bail '*if you say you did it'.* Curiously, he did not say he did the 'it'. On 07.12.15 the 'it' he was being questioned about was as to rape and procuring a miscarriage. And on 09.12.15 he continued to deny both, showing his will did not crumble. He only admitted intercourse, and only once, in 2015, saying nought about 2014. It is plain even if Lavia had uttered the words in para 8, (which I find he did not), there was no qualifying inducement as GH maintained his will and did not do as the officer had allegedly sought to induce. The deal offered was broken by GH, who did not deliver what Lavia sought.

The UK position

30 The Judges' Rules were replaced in England in 1984 by the Police and Criminal Evidence Act (PACE), which though not applicable on Antigua, nevertheless is of interest and assistance as from a sister jurisdiction.

31 In PACE, s76 governs confessions, and reads

> (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.

(3) In any proceedings where the prosecution proposes to give in evidence a confession made by an accused person, the court may of its own motion require the prosecution, as a condition of allowing it to do so, to prove that the confession was not obtained as mentioned in subsection (2) above.

[Underlining added]

32 Of particular interest is s76(2), which contemplates inquiry as to being sure there was nothing said or done as to make it likely a confession is unreliable. This is different from the Judges' Rules which instead focus on whether a statement is voluntary.

33 As a matter of common sense, a voluntary statement might still be unreliable, and so the admission of any confession ought always also to consider its reliability in all the circumstances.

A feasible misunderstanding

34 Reflecting on what happened, it is feasible there has been a misunderstanding between GH and Lavia. While I can be sure Lavia did not utter the impugned words, it can be imagined there may have been some frantic, muddled half-conversation, where GH, without a lawyer, two days in custody, in the stinky cell, thinking Lavia his friend, in desperation may have asked him questions in fleeting contact, without fully appreciating the answers and any caveats, and getting what he was told garbled. GH may have asked about bail, worrying there might be a long remand at the local prison which is famously in poor condition. It may be that he raised what would happen if he admitted there had been a relationship but not rape, and I can imagine Lavia might have responded that this would put GH in a better position as to bail, which would be true. GH might

think this a promise, which might explain his outburst at court (which has the ring of truth about it happening). But on this analysis, imagining it, bail was not a promise and there was no inducement; there would have been simply a degree of interaction and well-intentioned communication, though misunderstood, in a pressurised situation.

35 In the circumstance imagined in para 34, the admission, though arising in the confusion contemplated, would be 'voluntary' in the sense it was not obtained by a qualifying inducement, as the officer had not induced deliberately.

36 If so, to be admissible, the confusion contemplated ought then to beg whether the confession is reliable. On balance, in this case it probably is reliable, because:

a. GH says interviews 3 and 4 are true, and signs to this effect.
b. He gives details which are indicia of reliability, like referring to the burst condom, to the sex being within a month of his return from Jamaica, to feeling awkward as KG is his girlfriend's sister, and explains he wishes to tell the truth as, in his own words, he is *'honest and clean'*.
c. It would be arguably astonishing if a 15 year old girl would make up sexual contact with someone known to her in the context of having suffered a self-induced termination of pregnancy: either she is a monstrously wicked liar, or more likely, they had sex, as he accepted.

37 If the confession had indicia of being unreliable, to make it likely untrue, then it might properly be excluded in the circumstance imagined. However this is not the case here. What GH said is probably true and in principle should rightly be considered by a jury.

The questions to ask

38 Distilling matters, where there is a confession, the questions to ask are:

a. Has the officer deliberately set out substantially to make the will of on interviewee crumble?
b. If yes or maybe, then to achieve this, has the officer deliberately offered an inducement (in the sense of hope of advantage or fear of prejudice)?

c. If yes or maybe, then has the inducement in fact caused the will of the interviewee substantially to crumble?

d. If yes or maybe, then the inducement qualifies under the Judges' Rules as rendering any confession 'involuntary', and it may be expected a court will exclude it.

e. If sure there was no inducement as in a, b, and c, so that the confession was 'voluntary', nevertheless are the circumstances in which the confession was obtained such as to render it likely unreliable; if yes, then it should be excluded.

39 So, however one looks at this case, there was no inducement: first, as I am sure the words were not spoken as alleged; second, because the alleged transaction sought was broken and not delivered so that there was no qualifying inducement; and third, if miscommunication arose, as contemplated, there was no intent to induce on Lavia's part, while the confession, if obtained in the confusion contemplated, is likely reliable and ought to go to the jury.

40 For the three reasons analyzed above, each being separate, interviews 3 and 4 remain admissible.

The Hon. Mr. Justice Iain Morley QC

High Court Judge

19 October 2018