



HIGH COURT OF JUSTICIARY

[2017] HCJ 79

IND2017/2267

OPINION OF LADY SCOTT

in

in causa

HER MAJESTY'S ADVOCATE

against

JAKE HAWKINS

Accused

**Accused: Phillips (Sol Adv); Duncan & McConnell, Dundee
Respondent: Gillespie AD; Crown Agent**

14 September 2017

[1] The accused is charged on indictment with the rape of the complainer. The defence in this case have raised a preliminary issue by way of objection to the admissibility of a police interview conducted with the accused. I heard evidence and submissions on 21 August 2017. This is my decision.

The Evidence

[2] Evidence was led first from Detective Constable (DC) Smith who witnessed the detention of the accused and the completion of the SARF forms in the custody suite at the station. The duty solicitor was contacted, as requested, but he did not speak to the solicitor.

He did not know what information was given to the solicitor but normally he would expect that information to include the details of the complainer, when and where the allegation was made; the nature of the allegation; the name of the officer dealing with the enquiry and usually the solicitor would ask for and be given a brief summary of the evidence, including whether there was a corroborating witness and any forensic or DNA evidence being sought.

DC Anderson

[3] The main witness was DC Anderson who was an interviewing officer and the reporting officer. He had 10 years police service. DC Anderson had taken statements from the complainer and corroborating witness; taken DNA samples and arranged a Sexual Offences Liaison Officer (SOLO) take a detailed statement. He agreed he had a good deal of information. There was evidence from the complainer, a corroborating witness, incriminating statements obtained from mobile phone messages and DNA samples had been taken. After the accused was detained, the following day, he considered all the information, including the SOLO statement and with his colleague, the other interviewing officer, prepared a plan for the interview of the accused. The accused had consulted in person with his solicitor prior to interview.

[4] During cross examination on parts of the interview (p36) he explained the interview was in different parts or stages. They had gone from being "nice" to a "firmer" approach where there was a change of questioning and tone seeking in this stage to make "impact" on the accused.

DVD and Transcript

[5] The video of the interview along with the transcript (Crown production 17) were

then played. It lasted 1 hour and 22 minutes. DC Anderson gave evidence on the content.

In summary the relevant parts of this interview (CP17) and the evidence concerning the contents from DC Anderson was as follows:

1. At the outset the accused was cautioned and told that if he wanted a break or wished to have a further solicitor consultation that could be arranged and again told he could remain silent, no comment or he could provide an explanation (CP17 p3-4).
2. The accused stated at the outset on two occasions (p4-5) that he was going to follow the advice of his solicitor and make no comment.
3. Early on in the interview the accused did respond to general questions about himself (p6-14) and again later he responded to questions as to his general understanding of what rape is (p21-22). Otherwise he made no comment until the later part of the interview (p36).
4. The accused was also told (p36) that information obtained from the complainer and corroborating witness was that he had said to them that the complainer did not "provide" consent to have sex and that he had said he was sorry. It was put to the accused he had effectively admitted he had raped the complainer and his apparent remorse tells them that he knows he has done wrong. He was asked to provide "any form of defence" and told "we believe you're responsible " for raping the complainer
5. DC Anderson told the accused the police were impartial on 3 occasions (p31). He explained he meant by this that they were "not just for the victim". They were asking for a defence and treating both the accused and victim on an equal footing. In cross examination when it was put to him that this was not

true and he had told the accused (p36) that he believed the accused was responsible for raping the complainer, DC Anderson denied that he was not in fact impartial. He said that this was said at the “impact stage” of the interview. He denied having formed an opinion.

6. On three separate occasions the accused was asked to reconsider the advice of his solicitor to make no comment.

- (i) Firstly at p14-15 (suggested twice) as follows:

“Yeah. Okay. Now, I appreciate we've spoke about you and the reason we're here obviously relates to the rape. And I know, I know what eh the solicitor has said to you in terms of saying no comment. Ehm we will ask you to reconsider that right now. The reasons for asking that is for absolutely everything, there's two sides to every story, okay. But we go on, as the police, as a complaint made by someone, okay, and they tell us their story. Now, that's what we have to go on and that's what we investigate and our inquiries surround what they tell us. However, we know better than anyone that there's two sides to every story so enay, to enable us to get the full picture, in this case from yourself, we're kind of looking for some form of explanation or, you know, your side of the story if you want to call it that. So, I'm asking you things about ehm knowing R, knowing ehm C... We know you know them, okay, so, there's nothing that you're, you're hiding from us by not telling us that. So, I just want to continue with the questions ehm in relation to yourself. And I'll just ask you just to maybe reconsider what you're saying. And if there's anything you can provide by means of a defence when we get to that, then tell us and we'll explore it. We're impartial. I know that you're probably sitting there thinking that well, no, you're not, you're the police. Well, we are impartial. If you tell us something, we're obliged to go and investigate that but if you're no' going to tell us we don't know. Okay. So, before we go back to Saturday 13 August which, are you able to tell us where you were on that day?”

- (ii) Secondly at p30-31 as follows:

“It's quite a comprehensive interview, probably, to be fair. Ehm you, you've told me about you, you growing up and you've described yourself and your current lifestyle and things like that. When I've asked you about R, any sexual activity ehm the chance of, of getting you to explain how you know her and things like that, you were replying ‘No comment’ which is your right which is fine. When I've

asked you about C who we believe to be your friend, you've provided 'No comment' answers to that as well. We've asked you about the flat at [Dundee] which we believe to be occupied by R and C, you've provided us with eh no comment in relation to that. I've asked you to eh give an explanation or a possible explanation as to why you may be in the house legitimately and that leads to R's bedroom and you've provided no explanation in relation to that eh so far. So, like I says, it is an impartial investigation. R's accusing you of raping her and we're duty bound to follow that up and part of the enquiries includes this. Part of enquiries also include speaking to witnesses including eh C and such things, okay. Now, at any point during this, before I go over further evidence we've got against you, you know, you may want to reconsider what you said and provide an explanation. It's completely up to you. It's your life. A solicitor can tell you to say no comment 'cause they don't know you. They weren't there. They don't know what the police have got evidence wise. It's a standard answer, say no comment. Now, it's completely your right and you can take that and you've done that. That's absolutely fine. But I'd ask you to consider the fact it's your life. You have a chance, an opportunity for you to explain, here, what happened. It doesn't have to be eh anything as detailed as you may think. If there anything you want to say then I'd encourage you to say it and provide some form of defence for yourself and, if need be ... "

7. DC Anderson in evidence said he made this statement because he was looking for a version of events from the accused. He was cross examined about the statements made to the accused about the solicitor's advice. He said he was looking to extract any information to help the accused. Whilst he accepted that he did not know what the solicitor had been told about evidence, he denied that his suggestion to the accused was a lie. He stated "it would be true" and that it was just a general statement he made at the time. He did not accept it was misleading. Later he said it was not intentionally misleading. He denied attempting to "rubbish" the legal advice given. The purpose was to say to the accused it was his life, his decision.

8. When asked if he always told the evidence to a solicitor he replied that they would sometimes hold things back. They held back information in order that they could challenge an accused during the interview on that information.
9. In conclusion DC Anderson said he felt he had been straightforward at the interview, he did not accept he had misled the accused at any time. He kept questioning the accused, including at the impact stage, in the hope the accused would change his "no comment" position. He was looking for him to provide information.

(iii) On the final occasion (p36-37) DC Price asked the accused to tell them what happened. The relevant passage is as follows :

"A couple of things, Jake. Just going over, oh, just slightly what David's saying there, we've effectively asked you questions about your whereabouts you're being there. We've obtained statements from obviously the persons involved who tell us you've been in that, that flat, helped them move in from the flat upstairs and the like, so, we know you've been there. They know you, they've known you for about a year ehm going back at Fresher's Week last year I think you met C initially. Ehm so, we know you have some kind of relationship, certainly with C and we know who R is. Now all these questions about eh the sexual activity between yourself and R, it's only you and R that's in the room at the time. Like David points out, you've had a couple of opportunities now to give your version of events. We've obviously spoken to R at length and she's given us a version of events and you, we canna emphasise it strong enough, this is an opportunity for you to tell us what has happened in that room during the period you were in that room. So, again, similar to what David has done, I'd suggest to you that now is an opportunity for you to give us a version of events as to what's happened in the room"

The accused then responded by saying "Fuck it. It seemed wrong saying no comment" and he proceeded to make lengthy incriminatory statements.

Evidence of the Accused

[6] The accused confirmed he was 21 years at the time of the interview. He lived at home with parents. He was studying computer science at college, starting his second year. In 2014 he had suffered from depression and had received medication and treatment.

[7] He had not previously been detained or interviewed by the police. He asked for the duty solicitor and consulted him. He felt panicked in the interview. He had been told by his solicitor to make no comment to the questioning regarding the allegations and he took that advice.

[8] Specifically when the police said they were impartial he thought this meant they took an objective approach without taking sides. When it was put to him he had expressed remorse he felt like the police considered him guilty. They had shifted from what they said earlier. He thought they were already thinking he was guilty.

[9] When the police made the comments about his solicitor he thought they were saying the solicitor didn't care, that he didn't have the full picture and it was bad advice. He thought the solicitor had been giving advice without knowing everything. When he was told that the solicitor had given him "standard advice" he took that to mean the solicitor had not put any thought into his position. He didn't know what to do or say when this was said. He didn't know whether he could trust his lawyer. When asked what effect these statements had on him the accused said he thought he was making a bad decision in listening to the solicitor. He changed his position when he said 'fuck it, it seemed wrong saying no comment' (p37) He felt like the police had their evidence and the solicitor didn't care or know what he was doing. The police made him feel this.

[10] In cross examination as to why he had not asked for further consultation he said he did not think he had a good lawyer and doubted he could do anything for him. He had already been told by DC Anderson he was rubbish and didn't know what was going on.

[11] When it was put to him that he had on occasion during the interview chosen to answer questions when he wanted to, the accused said that was because these seemed irrelevant questions which were not damning. In re-examination he said he was advised not to comment on the allegation and he only answered general questions.

View of the Evidence

[12] I did not find DC Anderson a credible witness. On occasions he did not always directly answer questions and he shifted his position (for example as to whether he had misled the accused). I found him evasive and in particular I found his denial that he sought to undermine the legal advice given, not credible.

[13] I accepted the evidence of the accused. In particular I accepted that he understood the statements made about his solicitor was that the solicitor gave him bad advice and the effect upon him was he did not know whether he could trust him.

Submissions

Defence

[14] The defence submitted the statements made by the accused at the police interview were unfairly obtained having regard to suggestions made to the accused to reconsider the exercise of his right to silence; questions amounting to cross examination and most notably the challenge made to the legal advice given to the accused in an attempt to get him to depart from that advice.

Crown

[15] The Crown submitted that in fulfilling their investigative role, it was appropriate for police to show perseverance, diligence and patience in questioning suspect who may be disinclined to answer questions. Such an approach was demonstrated in this interview.

[16] The Crown emphasised the accused was cautioned (at p3 and p4) at the outset and told during the interview it was right or choice to answer the questions put. He was also told at start of interview that he could seek further legal advice during the interview itself (p4).

[17] Throughout the interview the accused was being asked only if he could provide an explanation. This was entirely legitimate. An explanation was not being demanded, nor – importantly - was he being urged to confess his guilt.

[18] The police interviewers conducted themselves in calm, courteous manner and there was no bullying either in tone of voice or language used.

[19] Further the accused was an intelligent young man who had demonstrated a robust ability in making choices as to when to answer and not to do so.

[20] Finally the Crown submitted that when the accused did change his position in the statements (from page 37-39) he gave a lengthy, detailed, free narrative account of what he says happened and this is properly categorised as spontaneous and voluntary.

Decision

[21] There was little dispute on the law. The starting point is that in order for a statement made by a suspect to be admissible and used as evidence against him it must be truly spontaneous and voluntary (Lord Hunter in *HMA v Mair* 1982 SLT 471). The onus is on the

Crown to demonstrate on the balance of probabilities that the accused's statement was fairly obtained and therefore admissible. In any assessment of fairness regard must be had to the whole circumstances.

[22] Here the stated purpose of the questioning, in the face of the accused's clear position he wished to make no comment, was to get him to change his position and answer the questions with intention of giving him the opportunity to "give his side of the story". The Crown suggested there was nothing wrong with that. As an abstract proposition that is correct. But this is a matter of fact and degree. Where the police try to get a change of position in order to get the accused to provide answers, they are, as has long been recognised, entering dangerous territory (see Lord Justice General Cooper in *Chalmers v HMA*) They must tread carefully. Whatever their stated intention, the issue is whether that in so doing, the police interviewers in fact applied undue pressure to get the accused to answer, whereby what is said could not reasonably be described as truly voluntary.

[23] I accept here there was no bullying or aggressive confrontation but there was on any view pressure applied for the accused to change his position and answer the questions. And that pressure in my assessment was carried too far from the combination of the following factors:

- (1) At the time of the interview the accused was the prime and only suspect.
- (2) The prolonged and repetitive questioning - by my calculation this amounted to approximately 213 questions bearing on the allegation, to which he replied no comment.
- (3) Questioning during the "impact" stage when the police told the accused they believed he was responsible for the rape and he knew he had done

wrong - paragraphs 4 and 5 above. This is cross examination (Lord Hunter in *HMA v Mair* 1982 SLT 471 at 473).

- (4) On repeated occasions and at length, the police suggested to the accused he should reconsider the advice of his solicitor to make no comment. Although the police also told the accused it was his right or choice not to answer, the admitted purpose behind these statements was for the accused to change his position and the way this was done constituted pressure.
- (5) Within this statements were made to the accused about his solicitor and the legal advice given - rehearsed above. This included the suggestion that the solicitor did not know what the evidence was, which was a suggestion the interviewer knew had no factual basis. Here there did not appear to be any other purpose for making these statements, other than to undermine the legal advice in the effort to get the accused to depart from it. DC Anderson did not provide a coherent explanation. The fact that the accused initially rejects this suggestion does not detract from the improper pressure that was applied (see p36 CP 17). In any event the accused in his evidence suggested this was part of the basis upon which he changed his position and made the statements that followed. (See above)

It should be obvious to the police that to seek to undermine a solicitor's advice to a suspect is wholly improper.

[24] I have concluded the repeated and prolonged questioning here, in the face of an exercise of the right to silence combined with repeated suggestions he should re-consider his exercise of that right constituted undue pressure. Here this was taken further and too far, by the statements made to the accused regarding the legal advice he had been given, which

statements taken together and in the context of the whole interview clearly undermined that advice. Whilst I accept that when the accused did give in or change his position the statements were in the character of a long and relatively free flowing narrative. I am also satisfied this was a direct a result of - and therefore tainted by - the undue pressure applied. Accordingly I am not satisfied, having regard to all the circumstances, the Crown have established this interview was fair and the statements made can properly be said to have been voluntary. I therefore uphold the objection.