

THE COURT OF APPEAL OF THE CAYMAN ISLANDS

Criminal Appeal 21 of 2018
IND 32/2017
SC#7268/2016

BETWEEN

RUEBEN HYDES

Appellant

AND

Her Majesty the Queen

Respondent

Before: The Rt. Hon Sir John Goldring, President
The Hon. John Martin, QC, Justice of Appeal
The Hon Sir Richard Field, Justice of Appeal

Appearances: Mr. Alex Davies of McGrath Tonner for the Appellant
Mr. Scott Wainwright, Crown Counsel for the Respondent

Heard: Wednesday 29 April 2020

Judgment Delivered: Friday 8 May 2020



JUDGMENT

1. On 21 March 2018 the Applicant was convicted by Justice Carter, sitting alone, on two counts. Count 1 was of possession of an unlicensed firearm, namely a High Point model JCP handgun, contrary to section 15(5) of the *Firearms Law (2008 Revision)*. Count 2 was of possession of eight rounds of .40 calibre ammunition. Two charges of possession of cannabis with intent to supply and simple possession were not proceeded with. He was sentenced to concurrent terms of 10 and 5 years respectively on counts 1 and 2. He now seeks leave to appeal against that conviction. We grant leave.
2. The fundamental issue in this appeal is whether, in the light of the uncontested medical evidence she heard, the judge was entitled to rely upon admissions made by the Appellant in interview.

The facts

The search

3. The Appellant lived Andy Drive, George Town. He shared the address with his brother Jason. The Appellant's bedroom was bedroom 2. On 15 November 2016 officers carried out a search of Andy Drive under the Misuse of Drugs Law. The Appellant was not in. His brother Jason was. Jason took the officers round. A large amount of cannabis was found in a suitcase in a room at the back of the house used by the Appellant's brother Leon. Jason said the drugs were his. He subsequently pleaded guilty to offences related to their possession.
4. Bedroom 2 was locked. The door had to be forced. Lying in bed was the Appellant's girlfriend, Katrina Bodden. The room was searched. The firearm was found inside the drawer of a dresser in bedroom 2 wrapped in a purple scarf. According to the police officers, although disputed by the Appellant, on top of the dresser were two copies of the Appellant's passport and his driving licence. One of the officers said that Katrina Bodden had attempted to move stuff in one of the drawers of the dresser. Inside her bag was found some cannabis.

The DNA evidence

5. As was and is agreed, the DNA evidence was, at best, of limited probative value. According to the prosecution analyst, the Applicant could have contributed to the multiple source DNA on the trigger. Such a multiple source DNA was 4.9-12 thousand more likely if the Applicant and 2 other unknown people had contributed to it. The defence analyst did not agree. She eliminated the Applicant as a contributor to the DNA on the trigger.
6. The purple scarf or handkerchief in which the firearm was found contained multiple source DNA. Such DNA was 240 times more likely if Katrina Bodden and three unknown people had contributed to it.

The interview of the Appellant

7. Two days later, on 17 November 2016, the Appellant gave himself up to the police. The interviewing officer was DC Louise Daniels. She said the Appellant was aware he was entitled to advice. DC Daniels contacted his attorney, Ms. Prathna Bodden. Ms. Bodden was out of the jurisdiction. DC Daniels provided her with pre-trial disclosure. Ms. Bodden spoke to the Appellant.

DC Daniels then spoke to Ms. Bodden. She confirmed she was content for her client to be interviewed. The Appellant agreed to be interviewed. The officer said:

“I had no concerns with his ability to understand my questions at that time. He was lucid. I have called stops before because I recognised certain symptoms or behaviours. Had I been aware I would have taken those into account with consideration. Had I known then, which I didn't, because these things were not evident and did not appear to have any negative implications on the questions I was asking. Nothing communicated to me there was a problem.”

8. The interview was taped. The judge listened to the tape. We have the transcript. The officer cautioned the Appellant. She explained in simple language that he did not have to answer the questions, that it was entirely his decision. She explained, again in simple language, what the possible consequences of refusing to answer questions might be. The following interchange then took place:

“...I understand you've spoken to Ms...Bodden before coming into interview (sic), is that correct?

Yes...

...you have agreed to come in and have your interview without her presence, is that correct?

Yes...

...I have spoken to her myself. She said she had a telephone consultation and that you have agreed to come in and have your interview without her presence, is that correct?

Yes...

...She also said that she is available on the end of the phone should you need to speak to her any further and so if you want to do that at any time during the interview just say because what we do is we pause the interview.

Okay...

...And also [if] you decide at any time that you want to have a lawyer present...arrangements can be made for someone to attend, so that is down to you to decide and let us know if you wish.

Okay.

...The other thing I need to check...is that you're fit and well to be interviewed...

...Yeah...

...tell me about the firearm and the drugs that were found at 23 Andy Drive.

*"It was in my room...It was in my room...And I am taking full responsibility for that and the drugs, them too, you know.
 ...I want to ask you some further questions...so when did the gun come to be in your room?
 Well, I really don't, no comment. I don't want to answer that.
 Where did it come from?
 No comment...
 Who else knew that you had a gun with you?
 No comment.
 Who else knew that you had drugs in your room?
 No comment.
 ...can you clarify...what drugs were in your room?
 [long pause] cocaine and weed.
 ...can you tell me what was inside [a flour bag found in your room]?
 No comment.
 Is there cocaine in the bag?
 ...no comment. [long pause] ...what I want to say, right... Can you pause that?
 I can't say anything to you off tape. If you want to speak to your lawyer.
 No. Well, I just want to own up...For whatever...They find in my room...So whatever they find in my room. I want to own up to it, whatever, whatever drugs...they found...
 ...when did you put the drugs in your room?
 No comment...
 Why did you have possession of the gun?
 My own protection."*

9. There followed a number of further questions and answers. Sometimes the Appellant replied, 'no comment.' When asked about drugs, he admitted to using them. He said the drugs found Katrina Bodden's handbag were his. She was not aware of the gun and the drugs in his room. He was asked about the drugs found in a room at the back of the house, which he agreed his brother Leon used, and which his brother Jason told the police were his. He said he had access to that room. The following interchange took place:

*"Have you got anything inside that room belonging to you?
 Yeah...couple of things what was found in there...
 ...there was quite a large quantity found in there. You're saying that's yours?
 Yeah...
 ...[Jason is] saying that's his, what's the truth here?
 The truth is that mine (sic)...I don't know why [Jason] would say something like that...
 ...How long has that weed been in that back room?
 No comment..."*

.... Jason dun have no part of that what they found in the back room...
Is I owning up (sic) for what is in the back room...and what was found in my
room...”

10. He later repeated he was taking responsibility for what was in his room and in the back room. He said the police were “*not going to use Katrina [Bodden]*” to get him to answer questions. There came a time when he asked to speak to his attorney. He did so. Thereafter, he made no comment to questions asked.
11. As Mr. Davies on behalf of the Appellant ultimately accepted, no criticism can be directed at DC Daniels. Her conduct of the interview was in the circumstances, impeccable. The judge, having listened to the tape of the interview, was of the same view.

The Appellant’s evidence

12. The Appellant gave evidence twice, firstly in a *voir dire* which was held to decide upon the admissibility of the interview, secondly, the interview having been admitted, during the trial. As we understand it, he essentially gave the same evidence on both occasions. In short, he said he understood what he was being asked in interview. He lied about the firearm, although not about the drugs found in his room. He was seeking to protect Katrina Bodden and his brother Jason. He said that Katrina Bodden or Jason could have opened his bedroom and put the firearm there. He said he knew nothing about the gun.

The medical evidence

13. The Defence case, grounded in the evidence of Doctor Clement von Kirchenheim, a clinical psychologist and Dr AL McGill, a psychiatrist, was that the admissions made by the Appellant in interview were unreliable, that in the circumstances, the judge could place no reliance upon what was said. There was no dispute about the admissibility of the medical evidence. Neither was there a dispute about what the doctors said.

The voir dire

Dr. von Kirchenheim’s evidence

14. Dr. von Kirchenheim's report of 12 December 2017 was admitted in evidence. In that report he said that, although the Appellant is illiterate, testing revealed his non-verbal cognitive ability was in the "Low Average" range. He described the Appellant as "*conciliatory, placating, (sic) ingratiating, and self-sacrificing.*" He said that such individuals are likely to have difficulties with sequencing and memory tasks. He said the Appellant's "*socially awkward and introverted...preoccupations with matters of personal adequacy and chronic feelings of worthlessness and guilt suggest the presence of a major depressive disorder.*" He said that, "*Extended periods of drug abuse are strongly indicated...these substances are likely employed to moderate the anxieties and personal inadequacies he feels in social relationships.*" He listed in order of their clinical significance and salience, major depression, post-traumatic stress disorder and adjustment disorder with anxiety. He said the Appellant suffered from a dependent personality disorder, a paranoid personality disorder with schizoid and avoidance personality type. He said the Appellant was fit to plead if given adequate time and explanations and the language kept to a basic level.
15. Dr. von Kirchenheim was asked what, if any connection there might be between his findings and the making of a false confession. The following interchange between counsel and the doctor took place (96/13 and following of the transcript):

"Are these traits associated with people who make false confessions?"

They may be. There is no perfect correlation when it comes to human behaviour, but they would be a predisposing factor which will make it more likely, but they are not necessarily causation. Correlation is not causation.

So, it increases the risk that that might happen if adequate safeguards aren't put in place, would you say?

Yes. I think the- again, this is actually a very complex picture because you have the interaction of a somewhat below average intellectual cognitive ability in addition to processing and learning disorders and then the personality traits. So, it's quite complex from that perspective.

So, the traits that you identified...might render a confession unreliable, but it's not for sure...not certain

That's correct.

And in terms of the traits you identified...how significantly do they deviate from the norm...in terms of what you would expect from an ordinary person? Is [the Appellant] typical or is he very different from the rest of us in terms of the traits he exhibits?

Well...all these traits are along a continuum, but for the diagnosis that I have presented, or the suggestions that I've submitted, that would indicate that they are

significantly different from the norm. Typically, what you would consider statistically would be anywhere from...say, 40 to 60 per cent would fall in the bell curve as being in the normal range, and then the more you go outside of that, the more it becomes diagnostic...

[T]here are degrees to which something is significant. It can be simply significant or...very significant or...obvious. Are you able to say...where he would fall on that sort of scale?

I think they are significant enough that these diagnosis (sic) came out and also the results of the cognitive ability test as well as the evidence of the learning disabilities in terms of him not being literate in spite of the fact that theoretically based upon his estimated IQ and the fact he was schooled, he should have been able to read and write to a higher degree than he currently is."

16. When asked by counsel for the Crown, Dr. von Kirchenheim agreed that it was clear from the interview that the Appellant was able to answer straightforward questions with straightforward answers.

Dr. McGill's evidence

17. Dr. McGill said the Appellant was demonstrated signs of a mild to moderate depressive disorder with moderate anxiety disorder with panic. She said they may be consequences of a post traumatic syndrome from childhood which is "*self-medicated with Cannabis.*"

The legal background

18. Section 40 of the *Evidence Law (2019 Revision)*, which is in similar terms to the 2011 Revision applicable at trial, provides:

"Nothing in this Law derogates from the power of a court in any criminal proceeding to disallow evidence otherwise admissible which, in the opinion of the such court, would, if allowed, operate unfairly against an accused person."

19. In the *voir dire* the judge considered her approach should reflect that set out in section 76(2) of the Police and Criminal Evidence Act 1984 (PACE) of England and Wales (which is not part of the Cayman law). That provides:

"(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.”*

20. The Crown accepted that the evidence of Dr. von Kirchenheim and Dr. McGill was admissible. It demonstrated some form of abnormality relevant to the reliability of the confession. Reference was made to the decision of the Court of Appeal of England and Wales in *O'Brien* 98/6926/27/28/S1, in which Roch LJ, giving the judgment of the Court said (at page 26) that, “...*the real criterion [of admissibility] must simply be whether the abnormal disorder might render the confession or the evidence unreliable.*”

21. The court went on to state:

“The members of this Court...are conscious of the need to have defined limits for the case in which [such] expert evidence...may be used. First, the abnormal disorder must not only be of the type which might render a confession or evidence unreliable, there must also be a very significant deviation from the norm shown...Second, there should be a history pre-dating the making of the admissions or evidence which is not based solely on a history given by the subject which points to or explains the abnormality or abnormalities.

If such evidence is admitted, the jury must be directed that they are not obliged to accept such evidence. They should consider it if they think it is right to do so, as throwing light on the personality of the defendant and bringing to their attention aspects of the personality of which they might otherwise have been unaware.”

22. As was the judge, we were taken to the case of *Steel* [2003] EWCA Crim 1640, another Court of Appeal case of England and Wales. In that case the successful appellant had been interviewed over two days. In the absence of his solicitor, he finally made admissions in his fourth and fifth interviews. His IQ, it later transpired, was 64 or 65. He was particularly vulnerable in all the circumstances. The only evidence against him was his confession. The Crown did not oppose his appeal.

The judgments in the present case

The voir dire

23. The judge said (at 1/24) said:

“Now, the test that must be applied under section 76(2)(b) [of PACE], and which would be relevant to the court’s consideration here of unfairness, unreliability, is that the court must find- and this is the authority of O’Brien- that there must be an abnormal disorder which would be of the type which might render a confession or evidence unreliable, and, this must be coupled with a very significant deviation from the norm shown. Secondly, there should also be a history predating the making of the admissions or the giving of the evidence which is not based solely on the history given by the subject which points to explain the abnormalities.”

24. The judge summarised the evidence of Dr. von Kirchenheim. She said (3/10):

“Now, Dr. von Kirchenheim was asked directly...as to whether or not the symptoms that he saw, and his findings would render Mr Hydes to be a person who might then evidence such traits that would be associated with a person who may make a false confession. Dr. von Kirchenheim agreed that there may be a correlation between the traits that he identified of (sic) the diagnosis of Mr Hydes, but he felt that Mr Hydes presented a very complex picture which might render a confession unreliable, but the doctor was not prepared to say that he was certain that it would. Now, the second part of the test is not only that the personality be of such a type as might render a confession...unreliable, but there must also be shown to be a very significant deviation from the norm.

Now, on this matter, Dr. von Kirchenheim when he was asked directly...as to whether or not [his] finding...were such as to show a very significant variation from the norm, stated that he would term it a significant variation, significant enough to produce the diagnosis which he had made. It was significant to the extent of 40-60 per cent of the norm.”

25. The judge went on to compare the Appellant’s mental disorder with the very significant disorders considered by the Court in *O’Brien* and *Steel*. The judge said (8/1):

“I do not find that those features are evident in this case. I believe the court has to be very careful...to keep within the guidelines as set out in O’Brien; and I find that the facts of this case does (sic) not lend itself to a finding that those have been met to the extent that they need to in order that the court can find the confession is unreliable.”

26. The judge went on to consider the fact that the Appellant did not have his legal representative with him at the interview. She said he was able to, and did, contact his attorney on, as she put it, at least two occasions. The attorney had had disclosure before she spoke to the Defendant. The judge referred to the evidence of DC Daniels to the effect that she did not recognise anything amiss with the defendant.

27. The judge said (9/14):

“It is obvious from the way the interview progressed, it appeared to this court, that the defendant was well able to follow the questions that were asked. Of course, the evidence has been led that if these are produced and he’s asked simple questions, that he should be able to follow, and this, obviously, was the case during the course of this interview.

In many instances the defendant himself led- a question was asked and before a follow-up question could be asked, he carried on with his answers. So there was no prompting. There was no long sequencing of issues or questions so that this defendant was not able to follow or to be able to give proper answers on interview.”

28. As to the pressure said to be upon the Appellant as a result of Katrina Bodden having been arrested, the judge said:

“The defendant says that during [the period between his arrest and handing himself in]...he was very worried about Katrina Bodden...Mr Dixey [on behalf of the defendant] asked the court to put all of this in the mix in terms of the considering the reliability of the statement, to say that the stress and the fear that the defendant [said] in evidence on the voir dire...were factors that would have affected the defendant in a particular way given his mental illness and the traits that were identified...However, I do not find that they were so significant in this case, bearing in mind these other factors, bearing in mind the extent of mental illness as shown by the doctors, to say that they would have any bearing on the reliability of the confession. So, although I do consider them, I do not find that they are such as to render the confession unreliable.

I find that the confession was reliable. I find that there is no issue as to whether or not the admission of this confession would operate unfairly against this accused in all the circumstance.”

29. Although in her judgment in the *voir dire* the judge did not refer in any detail to the evidence the Appellant gave, it is clear that having heard him, she did not believe what he said. Moreover, the

judge at some stage listened to the recording of the interview, as her final judgement, to which we shall now turn, makes plain.

The final judgment

30. The judge said (at 35, paragraph 102 and following):

“102. I do not accept the submission by the Defence that the Defendant’s medical/psychiatric/psychological makeup and personality traits are such as to render his confession unreliable or unsafe.

103. The doctors were both clear as to the Defendant’s character traits, and neither could state that the personality traits and psychological conditions displayed by the Defendant were significant enough for them to conclude that he was of a personality type to make a false confession.

104. This Court has heard the record of the interview and has observed the Defendant as he gave evidence. There is no question in my mind that the confession was voluntarily given. The fact that the Defendant was stressed-even given his personality traits- is not such as to cause me to find the confession is unsafe and that I should not rely on it in assessing whether the Crown have proved their case against the Defendant to the requisite standard.

105. The questions asked during the interview were straightforward and the Defendant had no difficulty in understanding them as he gave clear answers to them.

106. The Defendant was not tricked into answering any questions...When questioned in cross-examination, the Defendant admitted that he understood the questions asked. His answers to the direct questions...were that he had possession of the gun and that he had it for his own protection.

107. This Court notes that when the Defendant gave evidence at trial, he attempted to characterise what he had said in interview as a hypothetical question, instead stating:

‘I said if [our emphasis] I had a gun, it would be for my own protection.’

108. This Court has heard the record of the interview and it is clear that the Defendant did not answer the question...in this way...

109. The apparent lack of further detail is not such that the Court should find that the Confession is unreliable for false.

110. *The Defendant, after having the benefit of counsel, was happy to answer the questions asked. He confessed to having possession of the firearm quite early on in the interview...*

31. The judge referred to aspects of the Appellant's evidence which she did not believe. She did not accept, as he said in evidence, that he took responsibility for the firearm because he was "*frightened to hear the charges they were putting to me*" and because his girlfriend was locked up. Neither did she accept his evidence that, "*No-one had explained how serious these allegations were. I never knew it was a length prison sentence of at least 7 years. I was just frighten (sic)*" or that he did not know it was illegal to have a gun. The judge observed that it was an agreed fact that his brother Leon had been sentenced to eight years imprisonment for unlawfully possessing a firearm. We observe too, that very shortly before the interview, the Appellant had spoken to his attorney who had been provided with full disclosure. Finally (paragraph 116) the judge said:

"I accept the confession is evidence against the Defendant."

The grounds of appeal

32. We have read with care Mr Davies's written submissions on behalf of the Appellant. He also addressed us at some length. We can sufficiently encapsulate his submissions in the following way. He submits the judge failed properly to apply the law. She placed too high a burden on the defence. She did not take into account the unchallenged medical evidence. She did not provide any proper basis for refusing to accept the defence submissions to the effect that the Applicant's traits rendered him more likely to make a false confession, particularly at a time of stress. His admission to possession of the drugs which in the face of it were not his was evidence of self-sacrifice, spoken to by Dr. von Kirchenheim.
33. Mr Davies originally made the point that the judge failed to grapple with the Appellant's acceptance of responsibility for the drugs belonging to his brother Jason and his girlfriend, drugs in respect of which the Appellant was never charged. However, as Mr Wainwright pointed out, he was charged, although the case was not proceeded with in the light of his conviction on the firearms offences.
34. Mr Davies also submits that the judge should have considered whether there should have been an appropriate adult present at the interview.

Our analysis

35. As was said in *O'Brien*, evidence of an abnormal mental disorder may be admitted when that disorder might render the evidence of a confession unreliable. If unreliable, such a confession would, in the words of section 40 of the *Evidence Law*, “*if allowed, operate unfairly against an accused person.*”
36. Both the Crown and the judge, relying on the language in *O'Brien*, said that the extent of the abnormality must be *very* significant. The importance of any abnormality being *very* significant was spoken of in terms of a test. However, as it seems to us, when referring to ‘very significant,’ the court in *O'Brien* was meaning no more than that the deviation from the norm must be of sufficient significance as to give rise to a real or serious risk that the defendant’s confession may be unreliable. As Mr Wainwright on behalf of the Respondent, in his balanced and sensible submissions said, whether the risk is categorised as significant or very significant is not the most important thing. The degree of deviation from the norm is a factor when considering the reliability of the confession.
37. The fact that, in any given case, there may be an abnormality of such significance as to give rise to a real or serious risk of unreliability is not the end of the story. Where there is evidence of particular features in the case external to the psychological/psychiatric evidence that negate that risk, the judge would not be bound to exclude the confession. For, if, taking both the medical and other evidence into account, the judge is able to be sure that what the defendant said was reliable, he or she may rely on it. Each case must depend upon its own facts. Little assistance can be derived from other cases decided on different facts.
38. Apparent lucidity when interviewed does not determine the issue: see *Aspinall* [1999] 2 Cr App R 115. Neither, as it seems to us, is misconduct by the police a requirement.
39. It is clear from Dr. von Kirchheim’s evidence that the mental abnormality from which the Appellant suffered was a predisposing factor, rendering it more likely that he would make a false confession. In other words, there was a real or serious risk his confession was not reliable. To admit the confession, the judge, taking into account that risk, had to be sure on all the evidence of its reliability.

40. Mr Wainwright fairly accepted, that both in the judgment in the *voir dire* and the final judgment, the judge appeared at times to place too heavy a burden on the Defence. As set out in paragraph 25 above, she referred, in the *voir dire*, to Dr. von Kirchenheim not being prepared to say he was certain the traits he identified might render the confession unreliable. The Appellant did not, of course, have to prove they certainly did. The judge had to be sure they did not. In paragraph 103 of the final judgment (paragraph 31 above), the judge said that neither doctor was able to conclude that the Appellant was of a personality type to make a false confession. Although neither doctor could so conclude, the evidence was that his abnormality was of such significance as to be a predisposing factor making it more likely he would make a false confession without there being adequate safeguards (paragraph 15 above). That being the case, it was for the judge to be sure the mental abnormality did not lead to a false confession. The judge, as it seems to us, placed too much weight on the absence of a conclusion.
41. Moreover, as we have set out (paragraph 25 above) the judge also had regard to Dr. von Kirchenheim's categorisation of the abnormality as significant as opposed to very significant, something which for the reasons we have explained, does not in our view advance the issue. Neither, do we think, it advances matters to compare the facts of the present case with those of *Steel* and *O'Brien* (see paragraph 26 above). As we have said, each case depends upon its own facts.
42. While accepting the judge erred in the ways we have indicated, Mr Wainwright submits that when looked at in the round, the judge was sure the Appellant's abnormality did not render the admissions unreliable. She considered all the evidence, as she was required to. She analysed it with care. As she was entitled to, she did not believe the Appellant. It is clear she was sure the admissions were reliable and true.
43. We have anxiously asked ourselves whether in all the circumstances of this unusual case, these verdicts should be set aside as unsafe or unsatisfactory. Not without hesitation, we have decided that they should be. In the final analysis, we have a concern that the judge, whose task was not easy, placed too high a burden on the defence when deciding upon the reliability of the admissions; also, that she placed too great an emphasis upon Dr. von Kirchenheim's categorisation of the abnormality as significant, as opposed to very significant.

44. In the result, we allow these appeals against conviction. In doing so, we should make it plain that we are not saying that it would not be open to a judge, on a proper application of the law, and an analysis of all the evidence, to rely upon the admissions.

FIELD, JA:

45. I agree.

MARTIN, JA:

46. I also agree.

