IN THE INTERMEDIATE COURT (THE FINANCIAL CRIMES DIVISION)

CN 123/2020

IN THE MATTER OF:

THE INDEPENDENT COMMISSION AGAINST CORRUPTION (ICAC)

V

GUNSHYAM JEETUN

RULING

1. The accused stands charged before this court in an information containing a single count, for the offence of **bribery of public official** in breach of **Section 5 (1) (a) (2)** of the **Prevention of Corruption Act**. The accused pleaded not guilty to this offence and retained the services of counsel. On the 31st August 2021, the defence moved that the four out of court statements of the accused should be declared inadmissible. The defence contended that the four statements have been obtained by inducement; namely the accused was made to believe that he would be granted immunity from prosecution if he cooperated with the ICAC in the case against CPL Cotte. This motion was resisted by the prosecution. Following the communication of Diary book entries, particulars and a postponement on account that defence counsel was unable to attend due to COVID 19, a voir dire was held. The voir dire was heard on the 22nd March, April, August 2022. The defence and prosecution delivered their written submissions on the 18th October 2022. During the voir dire the prosecution called SI Abdool Rahman (witness 1), CI Chung Yen (witness 2) and Investigator Sultoo (witness 10). The accused testified under oath.

2. This court has carefully assessed the witnesses (and the accused) who deposed during the voire dire and the prosecution and defence submissions. The guiding principles with regard to issue of whether the accused's out of court statements should be rendered inadmissible and that this Court has applied can be found in Blackstone's Criminal Practice[1]. The following extract which has been referred to verbatim set out the principles and outline the state of the law with regard to "inducements" in the United Kingdom:

EXCLUSION FOR UNRELIABILITY: POLICE AND CRIMINAL EVIDENCE ACT 1984, S. 76(2)(B)

Background

F18.17

The Criminal Law Revision Committee, in its Eleventh Report: Evidence (General) (1972) Cmnd 4991, proposed that a confession should not be excluded simply on the basis that it was obtained in consequence of a threat or inducement, unless the circumstances were such that any resulting confession would be likely to be

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[1] - **Blackstone's Criminal Practice 2023/PART F EVIDENCE/Section F18 The Rule against Hearsay: Confessions/EXCLUSION FOR UNRELIABILITY: POLICE AND CRIMINAL EVIDENCE ACT 1984, s. 76(2)(b)/Background**

- Blackstone's Criminal Practice 2023/PART F EVIDENCE/Section F18 The Rule against Hearsay: Confessions/EXCLUSION FOR UNRELIABILITY: POLICE AND CRIMINAL EVIDENCE ACT 1984, s. 76(2)(b)/Application of Statutory Test.

- Blackstone's Criminal Practice 2023/PART F EVIDENCE/Section F18 The Rule against Hearsay: Confessions/EXCLUSION FOR UNRELIABILITY: POLICE AND CRIMINAL EVIDENCE ACT 1984, s. 76(2)(b)/Section 76 and Causation

unreliable. This proposal became the PACE 1984, s. 76(2)(b), though the term 'threat or inducement' was replaced by the wider notion of 'anything said or done'

Application of Statutory Test

F18.18

The PACE 1984 requires the trial judge to consider a hypothetical question: not whether this confession is unreliable, but whether any confession which the accused might make in consequence of what was said or done was likely to be rendered unreliable. The purport of this provision was considered in Re Proulx [2001] 1 All ER 57, where Mance LJ stated (at [46]):

> *The test in s. 76 cannot be satisfied by postulating some entirely different confession. There is also no likelihood that anything said or done would have induced any other confession. The word 'any' must thus, I think, be understood as indicating 'any such' or 'such a' confession as the applicant made. The abstract element involved also reflects the fact that the test is not whether the actual confession was untruthful or inaccurate. It is whether whatever was said or done was, in the circumstances existing as at the time of the confession, likely to have rendered such a confession unreliable, whether or not it may be seen subsequently – with hindsight and in the light of all the material available at trial – that it did or did not actually do so.*

Thus the court must consider whether what happened was likely in the circumstances to induce an unreliable confession to the offence in question, and to ignore any evidence suggesting that the actual confession was reliable.

In Cox [1991] Crim LR 276, an accused with a learning disability gave evidence at the voir dire in the course of which he admitted one of the offences with which he was charged. The trial judge was held to have wrongly based his decision to admit D's out-of-court confession on the admission by D. The same point was made in Crampton (1991) 92 Cr App R 372, where it was said that, if acts are done or words spoken which are likely to induce unreliable confessions, then, whether or not the confession is true, it is inadmissible. Although the judge may not be influenced by evidence that the confession is true in deciding admissibility, there is no rule against taking into account any other relevant evidence given at trial before the voir dire begins which assists in determining the questions posed by s. 76(2)(b) (Tyrer (1989) 90 Cr App R 446 at pp. 449–50). Such evidence must, however, relate to the period before, or at the time when, the confession is made: the judge must 'stop the clock' and consider the issue of reliability at that point in time (a proposition cautiously, but rightly, advanced by Mance LJ in Re Proulx).

F18.19

'Anything said or done' *Section 76(2) of the PACE 1984 obliges the judge to consider everything said or done (usually, but not inevitably by the police) and not to confine the inquiry to a narrow analysis analogous to offer and acceptance in the law of contract (Barry (1992) 95 Cr App R 384; Wahab [2002] EWCA Crim 1570, [2003] 1 Cr App R 15 (232)). The use of the phrase 'anything said or done', and the inclusion of all the surrounding circumstances, are indications that a confession may be inadmissible, notwithstanding that the police have not behaved improperly. In Fulling [1987] QB 426 the Court of Appeal stated, obiter, that it was 'abundantly clear' that a confession may be excluded under s. 76(2)(b) where there is no suspicion of any impropriety. Dicta in Brine [1992] Crim LR 123, stating that s. 76(2) is 'primarily concerned' with police misconduct, should not be understood to qualify this statement of principle. See also Harvey [1988] Crim LR 241, in which a psychopathically disordered woman of low normal intelligence heard her lover confess to a murder. As this experience may have led her to make a false confession out of a child-like desire to protect her lover, her statement was excluded under s. 76(2)(b). Harvey was cited with approval in Raghip (1991) The Times, 9 December 1991 and in Wahab. Such a confession might also be excluded under s. 78 (see F18.33). In the rather extreme case of M [2000] 8 Arch News 2, it was D's solicitor who, by intervening in the interview in an apparent attempt to secure a confession, rendered the resultant confession unreliable. In Wahab the Court of Appeal noted that where the solicitor provides proper legal advice to the client this will not normally be a basis for excluding a confession under s. 76(2)(b). In Roberts [2011] EWCA Crim 2974, it was the promise not to involve the police, held out by a shop manager, that gave rise to the inference that anything said in consequence was likely to be unreliable. A confession volunteered without anything being said or done clearly cannot fall foul of s. 76(2)(b) (see Ward [2018] EWCA Crim 1464 where an appropriate adult was the 'unwilling recipient of unsolicited confessions' by an accused, and nothing was said either by the adult or anyone else that was likely to render the confession unreliable).*

F18.20

Words or Actions of the Accused *It has been held that a confession cannot be rendered inadmissible under the PACE 1984, s. 76(2)(b), by reason only of something said or done by the accused (Goldenberg(1988) 88 Cr App R 285). In this case D was interviewed on suspicion of conspiracy to supply controlled drugs. The admissions which he made were alleged by the defence to be (a) an attempt by him to get bail, and (b) tainted by the fact that he was a heroin addict who, having been in custody for some time, would have said or done anything, however false, to gain his release so as to feed his addiction. The Court of Appeal considered that this argument was founded entirely 'on what was said or done by the appellant himself and on his state of mind', and that this was beyond the scope of the provision. The wording of the section, and in particular the words 'in consequence' in s. 76(2)(b), imported a causal link between what was said or done and the subsequent confession. It followed that the provision was looking to something external to the person making the confession and which was likely to have some effect in inducing a confession. Goldenberg was considered in Crampton (1991) 92 Cr App R 372, in which police officers interviewed D, a heroin addict, who it subsequently transpired was suffering from withdrawal symptoms. It was noted that in Goldenberg it was D himself who had requested the interview, but this was thought not to provide a ground for distinguishing the case, for it was doubtful whether the requirement for something external to be 'said or done' could be satisfied by the mere holding of an interview with an addict in withdrawal. The words of the statute contemplated some words spoken or acts done by the police which were likely to induce unreliable confessions. In Walker [1998] Crim LR 211, the Court of Appeal appears to have considered that the issue of whether D had taken cocaine before confessing had a*

material bearing on admissibility, but this appears to have been achieved by regarding the impairment of the accused as one of the 'circumstances' referred to in s. 76(2)(b).

A self-induced incapacity is clearly relevant to the issue of discretionary exclusion under the PACE 1984, s. 78 (see F18.54).

F18.21

***'Circumstances'** The accused's own mental state may be part of the 'circumstances' for the purposes of s. 76(2)(b). In Re Proulx [2001] 1 All ER 57, D confessed to a murder to an undercover operative who persuaded him that it was necessary in order to be accepted as a member of a criminal gang anxious to know the truth about his past. Whether this was something likely to induce D to make a false confession was something which could only be determined by an assessment of D. It does not matter that these circumstances may have been unknown to the interrogator at the time.*

F18.22

In Everett [1988] Crim LR 826, D was discovered in a compromising position with a five-year-old boy. On the way to the police station, and while he was there, he admitted indecently assaulting the child. D was a 42-year-old man with a mental age of eight, and was regarded by a medical witness as being in the bottom 2 per cent of the population. The trial judge regarded the medical evidence as irrelevant provided that he was satisfied (as he was) from listening to the tape recording of the police station interview that D's replies were rational and showed understanding of the questions. The Court of Appeal ruled against this approach, and held that the circumstances to be taken into account 'obviously include' the mental condition of a suspect at the time the confession came into being. The test to be applied was an objective one, i.e. not what the police officers thought (if they thought anything) about the mental condition of the suspect, but instead the actual condition of the suspect as subsequently ascertained from a doctor. The confession ought to have been excluded because the prosecution 'most certainly had not' discharged the burden of proving it admissible. Similarly, in McGovern (1991) 92 Cr App R 228, it was said that the physical condition and particular vulnerability of D (she was six months pregnant and of limited intelligence), while not being 'anything said or done' to D, were part of the background against which the submission that she had been wrongly denied access to legal advice had to be judged. The combination of circumstances had the far-reaching result that it was appropriate to exclude both the confession made as a direct consequence of the denial of access and a subsequent confession made in the presence of a solicitor which was tarnished as a result of the earlier confession.

F18.23

In Souter [1995] Crim LR 729, a confession was held to be inadmissible where it was made by a soldier who was in a state of extreme emotion and distress to an officer who had been sent to calm him down; other relevant

factors were that the conversation between the two had an appearance of confidentiality, and the officer had a very partial recollection of the rest of what had been said. The kind of mental condition which may be taken into account under s. 76(2)(b) is not limited to what might be termed 'impairment of intelligence or social functioning', still less to 'mental impairment' (Walker [1998] Crim LR 211).

In cases where the mental condition of the accused is a relevant factor, expert evidence is admissible if it demonstrates some form of abnormality relevant to the reliability of a defendant's confession (O'Brien [2000] Crim LR 676). In Ward (1993) 96 Cr App R 1, it was said that a mental abnormality would have to fall into a recognised category of mental disorder for expert evidence about it to be properly receivable, but in O Brien the Court doubted whether this was so, as the operative consideration was simply whether the abnormality might render the confession unreliable. The Court added that the abnormality would have to be such as to demonstrate a 'very significant deviation from the norm'. Expert evidence might also be crucial to the understanding of whether an accused of low IQ is abnormally suggestible, bearing in mind that such suggestibility might manifest itself at interview without necessarily being apparent to a jury when the accused testifies at trial with the support of counsel and the protection of the judge (King [2000] 2 Cr App R 391; Smith (Shane Stepon) [2003] EWCA Crim 927). O'Brien was further qualified in Blackburn [2005] EWCA Crim 1349, [2005] 2 Cr App R 30 (440), where it was said that expert evidence could be received on the question whether a vulnerable individual, after prolonged questioning, might make a false confession, given that the issue is one falling outside the ken of the normal jury. In Steel [2003] EWCA Crim 1640, the Court of Appeal reviewed a conviction for murder in 1979 to assess the effect of fresh psychological evidence of suggestibility and vulnerability in interview which drew on techniques that were unavailable at the time of the trial. Unlike in King, the defence could not establish that the confession had been improperly obtained. The Court, however, rightly considered that if the new evidence rendered the conviction unsafe it was not necessary to consider whether there had been a breach either of the Judges' Rules (which were in force at the time), or of any more thoroughgoing modern safeguards for the protection of suspects and the avoidance of miscarriages ofjustice. (As to expert evidence, see also F11.18.)

F18.24

Breach of PACE Codes *It is common for the defence to allege that the 'something said or done' includes a breach by the police of an obligation under the PACE 1984 or the Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers (see Supplement,* ***PACE Code C****). Such a breach will not lead to automatic exclusion of a confession obtained in consequence (Delaney (1988) 88 Cr App R 338), though it may, on its own or together with other factors, provide evidence that s. 76(2)(b) has not been complied with. In Delaney, D, whose psychological make-up was such that he was likely to feel unusual pressure to escape from interrogation, alleged that he had been induced to confess by a suggestion that the serious indecent assault of which he was suspected was more deserving of treatment than punishment. The interview was not recorded until the following day, in breach of Code C, and the Court of Appeal held that the absence of a reliable record of what occurred deprived the court of what was, in all likelihood, the most cogent evidence as to what had indeed happen during those interviews and what did induce the appellant to confess'. The breach was therefore significant, in that, the burden of proof being on the prosecution, the speculation necessarily engendered by the breach was sufficient to tip the scale in favour of the defence. For other cases where confessions were excluded, see, e.g., Doolan [1988] Crim LR 747 (failure to caution and to maintain a proper interview record*

or to show it to D); Chung (1991) 92 Cr App R 314 (questioning before allowing access to a solicitor and failure to show note to D or subsequently to his solicitor); Waters [1989] Crim LR 62 (improper questioning after charge resulting in ambiguous and potentially unreliable answer); DPP v Blake [1989] 1 WLR 432 (the 'spirit of the Code' was broken when a juvenile's estranged father was insisted on by police as the appropriate adult to attend her interview); Morse [1991] Crim LR 195 (juvenile's father acting as 'appropriate adult' and subsequently discovered to have low IQ and to be incapable of appreciating the gravity of the situation in which D found himself); McPhee v The Queen [2016] UKPC 29, [2017] 1 Cr App R 10 (109) (a decision of the Privy Council in which the failure to give any guidance to a clergyman acting as appropriate adult may have inhibited him from taking steps to question the way in which the confession had been obtained); Moss (1990) 91 Cr App R 371 (suspect of low intelligence interviewed nine times during a lengthy period of detention; access to legal advice improperly denied and no independent person present at interview).

Delaney and Doolan serve also to illustrate that 'something said or done' may consist of an omission to fulfil the requirements of the Code, although such an omission might always be described in more positive terms, for example, as interviewing the accused without having administered the caution as the Code requires.

F18.25

Repetition of Confession Originally Obtained in Breach of PACE Code *Where a breach of the PACE 1984 or a PACE Code has occurred which renders a confession inadmissible under s. 76(2)(b), it may be necessary to consider whether a repetition of the confession at a subsequent, properly conducted interview is also inadmissible. In McGovern (1991) 92 Cr App R 228, a subsequent interview was held inadmissible as it had been tainted by the matters which had led to the exclusion of an earlier interview, namely breaches of s. 58 and the interviewing provisions of Code C. It was further stated that the very fact that admissions were made at an earlier stage was likely to have an effect on the suspect thereafter, with adverse consequences for the admissibility of any repetition of the confession. In Glaves [1993] Crim LR 685 the Court of Appeal, whilst denying that there must necessarily be a 'continuing blight' on confessions obtained subsequent to a confession which is excluded under s. 76(2), nevertheless held that the breaches in the case (which included giving D, a juvenile, the impression that he was bound to answer questions) were not cured by a change of police officers and a caution, particularly as D had received no legal advice between the two interviews.*

Section 76 and Causation

F18.26

The words 'by oppression' and 'in consequence of anything said or done' in the PACE 1984, s. 76(2)(a) and [illegible] *law where causation was also an important consideration, Lord Lane CJ held that the judge should avoid any 'refined analysis of the concept of causation' and 'should approach it much as would a jury. … In other words, he should understand the principle and the spirit behind it, and apply his common sense. See also Tyrer (1989) 90 Cr App R 446 and Barry (1992) 95 Cr App R 384, in both of which it was accepted that the prosecution*

may discharge the onus of proof under s. 76(2) by showing that there is no causal link between the confession and things said or done by police officers which might have been conducive to unreliability, and Crampton (1991) 92 Cr App R 369, in which Rennie was cited in support of the proposition that a confession will not have been caused by anything said or done by an interviewer if a suspect is motivated to confess because of a perception that there may be an advantage from doing so. The demeanour of the accused when giving evidence on the voir dire may assist the prosecution in showing that threats allegedly made at interview had no impact (Weeks [1995] Crim LR 52)

Analysis

3. In the present matter to answer the test of *whether whatever was said or done was, in the circumstances existing as at the time of the confession, likely to have rendered such a confession unreliable, whether or not it may be seen subsequently – with hindsight and in the light of all the material available at trial – that it did or did not actually do so* as set out in **Re Proulx [2001] 1 All ER 57**, by Mance LJ (at [46]) and also to satisfy the guiding principles highlighted in Blackstone's Criminal Practice, this court has taken a two pronged analysis. The first analysis is with regard to the circumstances in which the accused's out of court statements were recorded by the ICAC officers. Secondly, this court has gone through the testimony of the witnesses to verify if there were any inducements regarding immunity that were made that had an effect on the state of mind of the accused.

Two pronged assessment of the circumstances and witnesses (including the accused) pursuant to Re Proulx [2001] 1 All ER 57 and application of the law.

(a) The ICAC officers: did they behave improperly?

4. It is a fundamental rule that an accused party has fundamental rights at interrogation stage. And it was incumbent on the prosecution to demonstrate that there was no impropriety at the enquiry level when the accused was interrogated at the ICAC and when the accused gave his statements. This court at the outset notes that during the course of the voir dire at all times the prosecution witnesses have maintained that the accused was never proposed immunity for the sake of cooperating. In fact, at page 5 of the transcript of the record of proceedings of the court sitting of the 22nd March 2022, witness No 1 SI Abdool Raman even expatiated on the circumstances in which the accused was interrogated. Witness 1 clearly explained that "immunity" was not discussed with the accused:

A: Your Honour, in fact, we as investigators, we do not consider this option. This issue is dealt at management level and we only investigate what we have on the case file and if ever there is evidence against a person, the evidence is put before him and he is informed of his constitutional rights and also if he is accompanied, we inform him that he has the right to consult a legal adviser of his own choice and if he ever wished to do so, he is given the liberty to consult a legal adviser and revert back to the ICAC to proceed with the investigation.

5. In other words, from the evidence on record, it is clear that the ICAC officers have not breached the accused's fundamental rights at interrogation stage.

The mental state of the accused: is he a vulnerable person of sub-standard understanding?

6. Furthermore, this court has assessed the accused's demeanour and testimony during the voir dire. This court finds that the accused's testimony has been seriously shaken. Because, the accused who is not a vulnerable person could not explain why he neither made any complaints during his first and subsequent court appearances (after his arrest) nor did he send any letters on his own or via his legal advisers regarding the alleged "immunity" the ICAC had proposed him. In simple terms, any reasonable man who would have been in the accused's position and who is an educated person with a certain level of understanding would reasonably have made a complaint at the first reasonable opportunity. There is absence of contemporaneity.

7. For these reasons and given that the prosecution has proved that the statements have been obtained lawfully and without any inducements beyond reasonable doubt, the defence motion is accordingly set aside.

A.Joypaul

Intermediate Court Magistrate

2.3.2023