



In The Supreme Court of Bermuda

CRIMINAL JURISDICTION

2013: 28

BETWEEN:

THE QUEEN

-v-

ZAKAI CANN

L. Ricketts and K. Swan of Department of Public Prosecutions;
C. Richardson of Compass Law for the Defendant

NO CASE RULING

Facts

1. The defendant is charged on a two count indictment with possession of a firearm without a licence and discharging a firearm in November 2009, contrary to sections 3(1)(a) and 4(1) of the Firearms Act 1973.
2. The key witness, Ms. Tiffany Atherley, gave the police a video-audio interview on 31st December 2009, in the presence of her lawyer, in which she in detail said she saw the defendant pistol-whip another man earlier that afternoon; he later gave her a lift to her home. There in her kitchen alone with her immediately after arrival he produced a firearm in hand and began to clean it. This scared her so much she asked him to remove it, particularly as he appeared to be pointing it at her and waving it around. Whilst he was cleaning it, it accidentally went off causing her to dash to the ground in fear that she was shot. So loud was the bang her ears were ringing. He, like her, was shaken up. He in startled fashion commented, the safety was not on. She soon realized a bullet hole in her refrigerator door and damage to the interior but no exit hole to the rear. She covered that up with a magnet. The defendant began searching for the shell and found it hooked up in his jacket. She then asked him to leave. She did not report the matter to the police.

3. There was a subsequent shooting about a month or so later, on 15th December 2009. On that same night she received a call or text from the defendant informing her that he was on his way to bring some clothing to her house. This so concerned her, she messaged her friend 'E', Ian DeSilva two messages informing him that *'ya bye call saying he is bringing clothes here.'* The defendant arrived and brought a red jacket and black jeans which he put on her couch. She recognized that these were the same clothing he was wearing on the night he discharged the firearm into her fridge door.
4. She later moved those clothing to the corner of her living room on the floor. She described the firearm to the police as silver and black with a clip.
5. Next day the 16th the police contacted her. Consequently she sent another message to her friend Ian informing him the police had contacted her for an investigation.
6. Upon her arrival to the police she was interviewed in the presence of her lawyer but made no comment. The following day the police searched her house using keys supplied by her and there found the bullet hole in the fridge with the magnet covering it and the clothing on the floor of her living room. These were all photographed and seized. There were other attempts at interviews but her response was no comment. She was arrested and charged and remanded in custody for offences akin to those with which the defendant is now charged.
7. Eventually on the 31st December 2009 in the presence of her lawyer she gave the police the video-audio interview detailing the above. In that interview she explained why she was reluctant to speak. She was fearful as she knew the defendant was a member of the MOB gang.
8. Her intent was to tell the truth on the first day she went to the police but the police pounced on her and she decided to remain silent. The defendant left the Island on 24th December 2009 and didn't return until 4th May 2010. He was arrested and charged on 1st November 2012. She refused the offer of protection. Meanwhile, the police kept vigilance of her, visiting her at her workplace from time to time. The case went cold. The police took a further audio-video interview from her in which she expounded her MOB fears.
9. The case was scheduled for trial on the 10th April 2012. The police had been in search of her without success. They had learnt she had left her workplace without a forwarding address. She was no longer living at her former address. She had been living with a new boyfriend at another place. They contacted that boyfriend; her mother and staked out her children's school with no success.
10. On the 8th April 2012 she had another lawyer draw up an affidavit swearing that she had lied to the police in her interview. That affidavit was passed on from that

lawyer to defence counsel and presented to the court on the day of the trial when she did not appear.

11. Two days were spent in argument over whether her interview should be admitted under the provisions of PACE on the grounds of fear or the failure to find her after reasonable steps. It appears she was not making herself available to the prosecution but she was in contact with the defence. It appears from information revealed to the court that she was very aware of what was being said and done in the court.
12. Her interview was ruled in on the Friday but no evidence was put before the jury.
13. On the Monday she appeared ready to testify, thus negating the previous ruling.
14. In her testimony she refused to cooperate with the prosecution. She asserted she could not remember telling the police anything. The prosecution sought to refresh her memory from her interview. After viewing her video-audio interview and reading the transcripts she continuously asserted before the jury that she accepts it is her in the interview saying the things therein, but she has no memory of saying them. After being unsuccessful at refreshing her memory, she was declared hostile and the prosecution cross examined her using the video and transcripts. She repeatedly asserted acceptance of saying those things but that she had no recollection of saying them and furthermore that what she said in that interview to the police was not the truth, it was all a lie.
15. She asserted that she only gave that interview because the police threatened her that if she didn't implicate someone they would declare her home unsafe and have Child & Family Services take her children. She also asserted that her lawyer told her that if she did implicate someone other than herself she would be released to go home to her children. Other than these recent assertions, there is no evidence, in my opinion of support. But she relies on her subsequent release on bail and the later Nolle Prosequi in support.
16. Most of the other evidence was agreed and formally admitted. It includes wearers DNA from the seized clothing matching the defendant, text messages from her to Ian DeSilva confirming her two messages, telephone records confirming the three numbers she gave the police including hers, the defendant's and Ian DeSilva's, a chart showing the times of contact and a forensic experts finding that the missile retrieved from the fridge was a bullet likely discharged from a semi-automatic pistol.
17. These pieces of evidence tend to be independent evidence tending to support the veracity of her statement to the police and tend to contradict her assertions that what she told the police was a lie.

18. That would be fine if I was able to say to the jury under Bermuda Law as it presently stands that they could consider and find the contents of her statement to be the truth, particularly in the context of this case where though she has accepted she made the statement she does not accept that its contents is the truth.

The Submissions

19. Defence counsel submits that in criminal cases, Bermuda is still bound by the common law, which is that when a witness is impeached as hostile and denies the truth of the content of her previous statement, the contents of her statement are only useful on the issue of her credibility. Those contents cannot be left to the jury to consider for their truth. The only evidence the jury should be left to consider in respect of the witness is what she said on the witness stand, that is, she lied. The jury cannot be directed to weigh the evidence of what she said on the witness stand with what she said in the previous statement to determine where the truth lies.
20. Defence further submits that if that is so, in the context of this case, there is no evidence of identification of who possessed the gun or discharged it because not only did she deny the interview as truth but she asserted in evidence she did not see the defendant with a firearm and did not know who of the ten or so persons she now asserted were in the house after a party, discharged the firearm. Thus the case must fail on limb one of *Galbraith*.
21. The prosecution submits that this case is quite different to the old common law cases which tended to deal with old-fashion written statements which made it difficult for juries to consider the content without more. This is a modern case with a modern video recording which the jury were able to see for themselves and should properly be able to make an informed assessment of the evidence and the contents of the video to determine the truth.
22. Defence counsel responds that the video recordings would put the jury in no better position than the jury in those old proceedings because just like in this case where the witness has accepted that it is her in the recording making the statements but she can't recollect it and that it is untrue, so too in the old proceedings the witness would have accepted that the statement is her's because it bears her signature but she can't recollect it and it is untrue.
23. Both counsel cited several authorities and statutory provisions. I take this opportunity to express my gratitude to them for their very useful assistance. It is noted that no local authorities were cited and it is thought that there is some need for some jurisprudential guidance and or statutory reform in this jurisdiction.

The Statues

24. Section 19 of the Evidence Act 1905, captioned **Party discrediting own witnesses**, provides for the manner in which a party may impeach his own witness. This provision is followed in scheme by sections 20 to 22A. They are silent as to the value of that impeachment, particularly when it comes to the issue of truth of the content of the previous statement.
25. Section 119 of the UK Criminal Justice Act 2003, provides that, *(1) if in criminal proceedings a person gives oral evidence and...(b) a previous inconsistent statement made by him is proved by virtue of section 3,4 or 5 of the Criminal Procedure Act 1865, the statement is admissible as evidence of any matter stated of which oral evidence by him would be admissible.*
26. There is no similar provision in the Bermuda Evidence Act 1905 or The Criminal Code Act 1907.
27. The UK provision under which a UK judge is required to instruct their jury is illustrated in the specimen direction of the Judicial Study Board. There a judge may direct a jury that the witness having been treated as hostile and having given an account in evidence which is inconsistent with a previous account given to the police, the jury may take into account any inconsistency when considering his reliability and where any conflict is found may reject the evidence altogether or may rely on all or part of what he said in the previous statement or what he said in evidence.
28. In the Queensland Australia Evidence Act 1977, section 101 provides, *(1) Where in any proceedings (a) a previous inconsistent or contradictory statement made by a person called as a witness in that proceeding is proved by virtue of section 17, 18, 19; or (b) a previous statement made by a person called as aforesaid is proved for the purpose of rebutting a suggestion that the persons evidence has been fabricated; that statement shall be admissible as evidence of any fact stated therein of which direct oral evidence by the person would be admissible.*
29. There is no similar provision for criminal matters in the statutory laws of Bermuda.
30. Consequent to this provision, a Queensland judge in a criminal trial, such as this, would be able to give a direction to the jury as evident in their specimen direction 44.1. That direction would in effect be that the prosecution relies on the statement to the police despite the witness in evidence saying it is not true; the previous statement being evidence of the facts stated in it, it is a question for you whether you accept the evidence and, if so, what weight you attach to it.

31. It is instructive that the identical provision is enacted in section 27C of the Evidence Act 1905 of Bermuda in respect of civil proceedings but it was not statutorily extended to criminal proceedings.
32. I am left in no doubt therefore; that it is to the common law we must look, to see the position in Bermuda in criminal matters.

The Common Law

33. *R v Alfred White (1924)* 17 Cr. App.R. 60, is authority for the principle, where a witness for the prosecution proves adverse and is shown to have made at other times a statement inconsistent with his present testimony, such statement is not evidence against the accused of the allegations it contains, but is relevant only to the credit of the witnesses.
34. In *R v Olivia [1965]* 1 W.L.R. 1028, where there was no direction by the trial judge to the jury that the statement given to the police by the witness in the absence of the police was not evidence of the truth of its contents but was only relevant to the witnesses credibility, this was held to be a serious non-direction.
35. In *R v Nelson [1992]* Crim. L.R. 653, it was held to be a serious misdirection when a trial judge directed that the hostile witnesses' evidence was unreliable when compared with her previous statement.
36. In *R v Golder [1960]* 1 W.L.R 1169, 11 72-73 it was held per Lord Parker CJ, '*when a witness is shown to have made previous statements inconsistent with the evidence given by that witness at the trial, the jury should not merely be directed that the evidence given at the trial should be disregarded as unreliable; they should also be directed that the previous statements, whether sworn or unsworn, do not constitute evidence upon which they can act*'.
37. *R v Maw [1994]* Crim LR 841 it must be considered a leading case laying out the principles and procedures to be followed in a case such as this.
38. That case clearly explains any misunderstandings that maybe applied by a judge relying upon the broad principle stated in *Golder*. It clearly confirms that at common law the evidence which the jury must rely on and must be clearly directed to rely upon is the evidence given at trial. The only value of the previous inconsistent statement given to the police is one of credibility. But that statement cannot be taken as truth and be of any greater value than the evidence given regardless of the conflict.

Conclusion

39. There is substantial merit in the submissions of defence counsel. In the circumstances of this case the previous inconsistent statement of Ms. Atherley has become useless. She has consistently accepted it is hers only because it is evident on the DVD but she has consistently asserted that not only does she not recall it but that its contents are all lies.
40. The jury would have to be directed that that statement would have to fall away. That only her evidence that she previously told lies and what she now says is the truth is to be considered by them.
41. In that case there would be no evidence from her tending to implicate the defendant. Without the previous interview the independent evidence would be supportive of nothing material.
42. In the circumstances it may be reasonable to feel that this was a witness well groomed to testify in a manner that fits the present law, it may to some leave a bad taste in the mouth of justice but it will have to be swallowed hard and a finding of no case to be answered must be returned, leaving to the relevant authorities the option to remedy the situation by legislation if they desire as was done in the UK and Australia and as was done in this jurisdiction in civil cases.
43. In this modern era, of witness intimidation and the like, it is relevant, you may think, to consider whether defendants should unduly benefit from old fashion rules or society should have the benefit of having the innocent acquitted and the guilty convicted on the basis of fair, modern, practical and sensible rules.
44. Today, I rule on the basis of the law as it presently is in this jurisdiction, the defendant has no case to answer.

Dated the 17th of April 2014.

Hon. Mr. Carlisle Greaves J.
Puisne Judge