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Court of Appeal: **Confession Evidence** and the Circumstances Requiring a Voir Dire

Confession Evidence and the Circumstances Requiring a Voir Dire

R v Bhavna Dhorajiwala [2010] EWCA Crim 1237

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The appellant was convicted of seven counts of theft. She was a pharmacist and manager of a shop. It was alleged that she had stolen money from the shop by failing to put sales transactions through the shop till, and then keeping the money for herself. There was material evidence of this produced by an independent investigator who had undertaken purchases from the shop on two occasions. Later inspection of the till roll did not show these transactions although, in her defence statement and later at trial, the appellant stated that she was following instructions from her employer to forward the money from those transactions to him. The second piece of evidence relied on by the Crown was an alleged confession made by the appellant to two independent investigators during an interview carried out by them when investigating the alleged offences. The transcript of the interview, written by one of them, included the standard 'police' caution, which was countersigned by the appellant. The interview record shows the appellant saying that she felt justified in taking the money as she had not had a pay rise, and she was desperate for the cash. The appellant signed every page of the handwritten record of the interview, and she also produced an envelope containing some money she said she had taken from the till and which was kept in the shop. The jury found the appellant guilty by a majority verdict.

The single ground of appeal concerned the manner in which this confession was admitted as evidence at the subsequent trial. Counsel for the appellant contended that the evidence of the confession should have been excluded because (a) the interview in which the confession was made significantly breached the PACE Codes of Practice and should have been excluded under the judge's discretionary power provided by s. 78 of PACE, and (b) the appellant 'felt oppressed by the circumstances and that she made the confession because of them'. Atkins LJ, in the Court of Appeal, declined to discuss whether there had been significant breaches of the PACE Codes of Practice, and thus the use of s. 78 of PACE to exclude the interview, because of the lack of evidence at first instance regarding the employment relationship between the pharmacy and the investigators.

Therefore, the focus of the appeal was (b) above: whether the confession should have been admitted following the alleged oppression that the appellant maintained led to her making it. The judge at first instance had listened to submissions from counsel at the start of the trial including those from the defence, who stated that the appellant had 'been prevented from leaving the room; she had not been allowed access to legal advice; she was threatened that the consequence of what [she] was alleged to have done was prison and the interview was conducted in a threatening manner' (at [27]). He then decided that he could rule on the application regarding the admissibility of the interview without conducting a *voir dire*, and his decision was to

admit it. The appellant contended that the judge was wrong to admit the evidence of the interview containing the alleged confession because he failed to consider properly or follow the correct procedural requirements for testing how that confession had been obtained.

Held, allowing the appeal and quashing the conviction, a 'representation' for the purposes of s. 76(2)(a) and (b) of PACE had, both in fact and in law, been made to the judge by the defendant's counsel, and on hearing this representation, the judge should have gone on to hear evidence from both sides on a *voir dire*. It was not sufficient to hold that there was no basis for proceeding with a *voir dire* when a reasonable submission had been made by counsel, and that the prosecution could not have satisfied beyond reasonable doubt that the confession had not been obtained improperly as required by s. 76(2) without that 'trial within a trial', in the absence of the jury. The confession should not have been admitted because the failure to follow the correct procedure rendered the trial unfair.

Commentary

While confessions remain as a common law exception to the rule against admitting hearsay in criminal trials by virtue of s. 118(1), rule 5 of the Criminal Justice Act 2003, their admissibility is governed by the provisions of the Police and Criminal Evidence Act 1984 (PACE). Section 82 of PACE interprets a confession as including 'any statement wholly or partly adverse to the person who made it, whether made to a person in authority or not and whether made in words or otherwise'.

Section 76 of PACE provides:

- (1) In any proceedings a confession made by an accused person may be given in evidence against him in so far as it is relevant to any matter in issue in the proceedings and is not excluded in pursuance of this section.
- (2) If, in any proceedings where the prosecution proposes to give in evidence a confession made by an accused person, it is represented to the court that the confession was or may have been obtained--
 - (a) by oppression of the person who made it; or
 - (b) in consequence of anything said or done which was likely, in the circumstances existing at the time, to render unreliable any confession which might be made by him in consequence thereof, the court shall not allow the confession to be given in evidence against him in so far as the prosecution proves to the court beyond reasonable doubt that the confession (notwithstanding that it may be true) was not obtained as aforesaid.
- (3) In any proceedings where the prosecution proposes to give in evidence a confession made by an accused person, the court may of its own motion require the prosecution, as a condition of allowing it to do so, prove the confession was not obtained as mentioned in subsection (2) above.

The decision by the Court of Appeal was on the basis of 'a material failure in the procedure' (at [29]) undertaken by the judge in the case. The court was of the opinion that such allegations that had been made in this case had to be investigated further by examination of the interview evidence on the *voir dire* and (at [22]) considered that the appeal raised four questions.

The first was as to what constitutes a 'representation' for the purposes of s. 76(2). The Court of Appeal decided that a statement by responsible counsel, based on documents or cogent evidence in his possession, showing that the confession may have been obtained by oppression or in consequence of something said or done that may render the confession unreliable is a representation for these purposes. There was reference to limited guidance offered by Russell LJ in *R v Liverpool Juvenile Court, ex p. R* [1988] QB 1 at 10H and 11A, where it was decided that 'representation' is not the same as suggestions of an improperly obtained confession during cross-examination.

The second question was as to whether representations had been made to the court. This was answered in the affirmative by the Court of Appeal (at [24]). The representation consisted of an application by defence counsel to exclude the interview record, based on the documented interview transcript, and a proof of evidence from the appellant that she had made the confession due to the oppressive nature and circumstances of the interview, thus the provisions of s. 76(2) were now applicable.

The judge at first instance had only heard submissions regarding the making of the confession at this point, but not any evidence, concluding that it was not necessary to assess the matter further. In *R v Liverpool Juvenile Court, ex p. R* (at 10E), the court held that where there was no representation made, the defendant can, for tactical reasons, challenge the admissibility or weight to be given to the confession later in the trial through cross-examination, and not by way of a *voir dire*. This ruling was specifically limited to summary procedures (at 11B), but this position for all criminal cases was confirmed by the Privy Council in *Ajodha v The State* [1982] AC 204. The post-PACE case of *R v Sat-Bhambra* (1988) 88 Cr App R 55 discussed whether the same common law rules applied. It was held that where the defence elects to forgo challenging the confession before the prosecution attempts to adduce it, the defence cannot then rely on the provisions of s. 76 (or s. 78) of PACE once the confession has been adduced because the wording of s. 76 and s. 78 precludes that--both sections refer to the prosecution 'proposing' to give in, or rely on evidence, meaning that the challenge to it must be made before the evidence is given for the provisions of s. 76 to come into play.

However, in the present case, there was no evidence to suggest that the defence wished to make use of that option in an attempt to undermine the prosecution evidence at a later stage. In fact, the contrary position, that the appellant wanted to contest the evidence of the confession before it was admitted, is more realistic, despite there being no specific request for the *voir dire*.

The Court of Appeal then went on to consider the third question: whether, as the answer to question two was 'yes', that a representation had been made, was there a possibility of any oppression for the purposes of s. 76(2)(a), or was there a possibility that the confession was unreliable under the provisions of s. 76(2)(b). Again, the answer was in the affirmative, in that the allegations made by the appellant (at [27]) could come within the definition given to oppression in *R v Fulling* [1978] 1 QB 426, by Lord Lane CJ, using the Oxford English Dictionary's meaning that oppression could involve 'the exercise of power in a burdensome, harsh, or wrongful manner, the unjust or cruel treatment of subjects, inferiors etc. or the imposition of unreasonable or unjust burdens' ([1978] 1 QB 426 at 423F). Further, Lord Lane's view was reiterated, that s. 76(2)(b) was a wider provision, and thus could apply even if there were no impropriety on the part of the investigators.

Having established that the confession may have been unlawfully obtained, the Court of Appeal's final question was whether the prosecution had proved beyond reasonable doubt that it was not so obtained by producing the interview transcript alone. The court found that where the judge wrongly concludes there is no reasonable argument for challenging the admissibility of the confession, and wrongly fails to conduct a *voir dire*, it is 'logically impossible' (at [28]) to be satisfied that the Crown had proved beyond reasonable doubt that the confession had not been improperly obtained.

Aitkens LJ held that for the purposes of s. 76(2), there was no requirement for a specific request from counsel to hold a *voir dire* in order for the prosecution to prove beyond reasonable doubt that the confession was not obtained contrary to the provisions of s. 76(2)(a) or (b). It was noted that as neither counsel invited the judge to do this, the court should have exercised its power under s. 76(3) to require the Crown to prove beyond reasonable doubt that the confession had not been obtained under either s. 76(2)(a) or (b) (at [27]). Section 76(3) specifically provides that the court *may* require that the prosecution prove beyond reasonable doubt that the confession was not obtained as described in s. 76(2)(a) or (b). It is submitted that the Court of

Appeal substituted 'must' for 'may' so that a *voir dire* must now be held where the admissibility of a confession is reasonably challenged before the prosecution attempts to adduce it. It will be interesting to see how this provision is interpreted in future cases because, as the Court of Appeal held that a representation had been made, the discussion on s. 76(3) was *obiter*.