

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
(CRIMINAL)**

SAINT LUCIA

CLAIM NO. SLUHCRD 2009/0111

BETWEEN:

THE QUEEN

Claimant

AND

KEVIN EDWARD

Defendant

Appearances:

**Mr. M. St. Catherine for the Defendant
Mr. G. James Crown Counsel for the Prosecution**

.....
2010: January 21 and 29
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RULING

- [1]. **BENJAMIN, J. :** By an Indictment laid on August 21, 2009, the defendant was charged for the offence of robbery. The particulars of the offence as stated in the said Indictment are that on Saturday 20th December, 2008 at about 9:00 p.m. at Bishop's Gap situate in the quarter of Castries, the defendant did commit robbery upon Sheltz Arjaur Joseph. At arraignment, the defendant entered a plea of not guilty.
- [2]. Pursuant to orders made at the case management conference, learned Counsel for the defendant applied to the Court by way of pre-trial motions for the exclusion of certain

statements alleged to have been made by the defendant on Saturday, 17th January, 2009 and Sunday, 18th January 2009 to Police Constable 496 Alain Providence. These statements are being objected to as being inadmissible under the Evidence Act No 5 of 2002 as amended by the Evidence (Amendment) Act No. 46 of 2006 ("the Act").

- [3]. The Prosecution led evidence through the witnesses, PC Alain Providence and Mr. Hudson Kelly, a Justice of Peace, in support of the admissibility of the said statements at trial. The defendant did not lead any evidence and the mounted his challenge on the basis of the testimonies given by the said witnesses.

THE EVIDENCE

- [4]. Constable Providence told the Court that at about 9:15 p.m. on 20th December, 2008 he received a report from Arjaur Joseph at the Marchand Police Station. The Constable said he first met the defendant at the Marchand Police Station on Saturday, 17th January, 2009 at about 1:10 p.m. and informed him of a report of robbery made against him by Arjaur Joseph. He went on to detail the allegation made in the report, namely, that the virtual complainant had a gold ring on his right middle finger and \$ 5.00 in his right front pocket and that the defendant had taken those items from him. The defendant was cautioned and he made a response which the Constable recorded in his pocketbook. The statement was read over to the defendant who acknowledged that it was true and correct and signed it. At that time, only the Constable and the defendant were present. This alleged statement ("the first statement") was identified by the Constable's handwriting and signature in his pocketbook.

[5]. Later on at 1:30 p.m. at the said Marchand Police Station Constable Providence informed the defendant as to his rights as a prisoner in custody and prepared a written form which was signed by the defendant. The defendant asked to speak to one Ann whom the officer described as his aunt but who was referred to on the form as his grandmother. The said form reflects a signature by one PC 266 Bernadine as witness.

[6]. On Sunday, 18th January 2009 at about 5:01 p.m. PC Providence introduced Mr. Hudson Kelly, a Justice of Peace, to the defendant, who was then reminded of the caution. The officer said the defendant then elected to make another statement which was again recorded in his pocketbook. The defendant agreed it was true and correct and signed to the entry along with the Justice of Peace. The statement reads as follows:

“... on Friday the 16th day of January 2009 about 4:00 p.m. to 5:00 p.m. I went to Coolie Town in Castries when three guys from Marigot namely Roach, Novel and a third I think his name is Brian robbed me and took my poach and the ring was in it. The ring was not gold.”

[7]. Subsequent to this statement (“the second statement”) being recorded, the defendant was arrested on suspicion of robbery and cautioned. He then remained silent.

[8]. Constable Providence formally charged the defendant with robbery later that day and cautioned him. The defendant elected to make a statement which was written down on the prescribed form reflecting the charge. This latter statement is not the subject of any challenge.

[9]. When cross-examined, PC Providence stated that when he recorded the first statement he was aware that no lawyer or Justice of Peace was present and that the Act had not been complied with. He further agreed that when he interviewed the defendant on 18th December 2009 he did so in the presence of the Justice of the Peace whom he had invited to the station. During re-examination, Crown Counsel elicited from the witness that in relation to the first statement he was merely informing the defendant of the offence and that the defendant was not being interviewed. This was put in contrast to the second statement when he interviewed the defendant in the presence of the Justice of Peace.

[10]. In his evidence, Mr. Hudson Kelly, confirmed his presence at the Marchand Police Station. He said he was introduced to the defendant as a Justice of Peace. Mr. Kelly said that PC Providence read the charge to the defendant but he could not recall if the defendant had said anything before that was done. However, Mr. Kelly did recall the defendant mentioning that "he had stolen the ring and the ring had been taken from him although the ring had proven to be fake." This witness had no recollection of the Officer doing anything about that statement made by the defendant. It seems to me that he failed to recollect having signed to any statement as his signature appears in the Officer's pocketbook. His recollection of the defendant saying that the ring was fake and that the defendant had admitted stealing the ring was only partially consistent with what was recorded.

SUBMISSIONS

[11]. Counsel for the defendant sought the exclusion of both statements on the ground that the procedural requirements of section 72 (2) (a) and (b) of the Evidence Act as amended had

not been adhered to. In the case of the first statement the absence of a Justice of Peace or the attorney-at-law was highlighted as the basis for its rejection. It was argued that whatever the language used by the officer who insisted that he was not then interviewing the defendant but rather that he was only informing him of the offence when he made the reply, it amounted to an investigation of the matter. It was posited that, being mindful of the procedural omission, PC Providence sought to correct it on 18th January 2009 when he recorded the second statement.

[12]. At the close of his submissions, Counsel conceded that the second statement was admissible in terms of what was recorded in the pocketbook, as against what was set out in the report of the investigator. As I see it, what is recorded in the pocketbook would be admitted into evidence at trial and any inconsistency would be a matter of weight for the jury.

[13]. Having regard to the concession by Defence Counsel, Crown Counsel focused his response on admissibility of the first statement. It was first contended that the admission was not made "in the course of official questioning" as required by section 72 (1) (c). It was said that having regard to the statutory definition of 'official questioning' the defendant had simply been cautioned and no questions put to him, whereupon the statement was spontaneously blurted out to PC Providence, who duly recorded what was said.

[14]. In the alternative, it was argued that the Officer had complied with section 72 (2) (c) of the Act, should the Court construe the proceedings as an interview resulting in an admission in the course of official questioning.

SECTION 72

[15]. The Evidence Act No. 5 of 2002 represents a break from the common law and legislation passed in England. Research suggests that the language was in large part drawn from the legislation in Australasia.

[16]. Section 72 has as its heading 'Criminal proceedings: admissions by defendants.' Subsection (1) delimits the scope of the application of the entire section and provides as follows:

"This section applies only –

- a. In criminal proceedings;
- b. In relation to evidence of an admission made by a defendant who, at the time when the admission was made, was or ought reasonably to have been suspected by an investigating official of having committed an offence; and
- c. Where the admission was made in the course of official questioning."

Section 2 of the Act prescribes the meaning of the terms "admission" and "investigating official." The former is defined to include a confession. An investigating official is defined to include a police officer.

[17]. On the evidence led at the voir dire, it is plain that the officer had the report and statement of the virtual complainant to the effect that the defendant had robbed him of his gold ring. Consequently, there can be no demur that at the time when the admission was alleged to

have been made to the investigator by the defendant on 17th January, 2009, PC Providence ought reasonably to have suspected the defendant of having committed an offence.

- [18]. The expression 'in the course of official questioning' has not been defined in the Act. In the case of Kelly v. R. (2004) 218 CLR 216, the High Court of Australia grappled with the phrase and sought to explore its meaning in the three separate judgments delivered. In that case, after a video-taped interview where he contended that a prior confession was false, the defendant was being taken to the Hospital for samples to be taken. The interviewing officer had purported to end the interview by saying:

“Right, in that case, then we’ll conclude the interview...”

When the defendant was about to get into the car with police officers, he told the interviewing officer:

“Sorry about the interview no hard feeling I was just playing the game. I suppose I shouldn’t have said that, I suppose you will make notes of that as well.”

The officers did not respond, no notes were taken and no attempt was made to return the defendant to the interview room. The event in issue took place between 30 minutes to an hour after the interviewing officer spoke the words ostensibly bringing the interview to an end. A majority of the Court agreed that the impugned statement was not to be treated as having been made in the course of official questioning.

- [19]. I consider it inescapable that when the investigator in the present case told the defendant of the report and cautioned him, this was done within the broad interpretation of the term in the course of official questioning. If not, why then was the defendant cautioned and told of

the report. It matters not that the defendant had not yet been informed of his rights as a prisoner in custody. Having regard to the caution being administered in the context of the report being outlined, this could not be a case of the defendant having spontaneously volunteered an answer. He was told that whatever he said would be taken down in writing should he elect to give up his right to silence. Accordingly, the first statement falls afoul of subsection (2) (a) and (b) is thereby rendered inadmissible. No attempt was made in the evidence or submissions to rely on the provisions of subsections (5) and (6).

[20]. The alternative submission invokes section 72 (2) (c) which begins 'in any other case thus embracing situation where section 72(a) and (b) do not apply.' This can be dealt with shortly as there is no evidence of the reading of the written record of the interview being tape recorded as required by section 72 (2) (c) (iv).

[21]. In the premises, it is ruled that the first statement made on January 17, 2009 is not admissible and that the second statement made on January 18, 2009 be admitted into evidence at trial.


KENNETH BENJAMIN
HIGH COURT JUDGE