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IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
Strand
London, WC2A 2LL
6th March 2008

B e f o r e :

LORD JUSTICE LATHAM
(Vice President of the Court of Appeal Criminal Division)

MR JUSTICE CRANSTON

SIR RICHARD CURTIS

R E G I N A

v

LUCIANO MONTEIRO COELHO

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Mr M P McDonald appeared on behalf of the Appellant
Mr M Fitzgerald appeared on behalf of the Crown

HTML VERSION OF JUDGMENT

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1. **LORD JUSTICE LATHAM**: On 9th May 2007, in the Crown Court at Blackfriars, this appellant was convicted of witness intimidation (by a majority of 11 to 1) and of criminal damage. On 5th June 2007 he was sentenced to 42 months' imprisonment. He appeals against his conviction and sentence by leave of the single judge. The only ground upon which the single judge gave leave was a ground based upon a ruling by the judge to the effect that certain evidence which was undoubtedly obtained in breach of the Code of Practice did not render the statement that was admitted, as we shall see, one which rendered the proceedings unfair under section 78 of the Police and Criminal Evidence Act.

2. To put that very general statement of the issue into context, the facts were that on the evening of 29th August 2006 the prosecution case was that the appellant drove a man called Delphon Nicholas to the address of a girl who had been the victim of a serious assault in the June of that year. Those charged with the offence were awaiting trial at the Woolwich Crown Court. A brick that night was thrown through her window, and attached to the brick was a note on which were written the words "Grass. Next time

your death". The appellant's fingerprint was subsequently found on the note and this resulted in his arrest. On 24th October 2006 he was interviewed in the presence of his solicitor and made no comment to the questions that were asked.

3. The evidence of the officer in the case, Detective Constable Draycott, was that some three hours approximately after the interview, when he went to bring the appellant up from the cells to be charged, the two of them had a brief conversation. It should be said that the appellant's first language is Portuguese, although he understands English and had been interviewed in the first instance in English, and indeed the trial was conducted without an interpreter. Be that as it may, when Detective Constable Draycott went to the cells a conversation took place in Portuguese, which was a language known to Detective Constable Draycott. According to Detective Constable Draycott, the appellant said to him in Portuguese: "I was there but I did not want to throw the brick. A guy called Delphon did. He was going to pay me £40 to do it. I refused. He wrote the word 'grass'. I wrote the rest". He was some 15 minutes later or thereabouts charged and subsequent to that left the police station. He left, it appears, at about the same time as his solicitor.

4. The Detective Constable did not make any note of the conversation until significantly after the appellant had left the police station. He did so, he says, after he had asked a senior officer what he should do, he being concerned in particular about the involvement of Delphon, and was told by the senior officer to make a note, which as we indicated he did, and to forward that with the other documentation to the Crown Prosecution Service.

5. That evidence as to what was said to have been said by the appellant was challenged by the appellant in the course of the trial. His evidence was that there was a conversation in Portuguese to the general effect of what was said by the Detective Constable, but he specifically denied saying the words, "He wrote the word 'grass'. I wrote the rest". There was, as a result of the application of the appellant's trial counsel, a voir dire in relation to the admissibility of that conversation. The judge ruled that although there had been breaches of the Code, the overall state of the evidence was such that it would not be unfair to allow that conversation to go before the jury, and, as we have indicated, the essential ground of appeal in this case is that the judge's ruling was wrong.

6. The basis upon which counsel for the appellant sought to exclude the evidence of the Detective Constable was that there were multiple breaches of the Code of Practice. The relevant paragraphs in the code are firstly 13.4, which provides as follows:

> "In the case of a person making a statement to a police officer or other police staff other than in English:
>
> (a) the interpreter shall record the statement in the language it is made;
>
> (b) the person shall be invited to sign it;
>
> (c) an official English translation shall be made in due course."

The second relevant paragraph is C11.13, which provides as follows:

> "A written record shall be made of any comments made by a suspect, including unsolicited comments, which are outside the context of an interview but which might be relevant to the offence. Any such record must be timed and signed by the maker. When practicable the suspect shall be given the opportunity to read that record and to sign it as correct or to indicate how they consider it inaccurate."

7. As can be appreciated from our recitation of the facts, this was a statement made in Portuguese and the Detective Constable made no record of it in its original language. Accordingly, there was a clear breach of paragraph 13.4 of the Code. Further, there was no record made by the Detective Constable which was timed and signed as required by paragraph C11.13, the appellant was not given any opportunity to read the record and to sign it as correct or to indicate how he considered it inaccurate, so there was a further breach of paragraph C11.13.

8. Those were, in our judgment, significant and substantial breaches of the Code in the context of this case. There was ample opportunity for the Detective Constable to have made an appropriate note in writing, to have signed it and to have given an opportunity to the appellant to read it and either agree it

or not. That was particularly important in the context of the fact that in this case his solicitor was, it would appear, still in the police station at the relevant time.

9. This court has said in the case of Keenan [1990] 2 QB 54, that where there has been a significant and substantial breach in relation to such statements, "it makes good sense to exclude them". That clearly is not a matter of rote, in other words that any breach will automatically result if significant and substantial in the relevant material being excluded, but it does indicate the way the court should approach such breaches and be astute to ensure that there is no possibility of unfairness arising.

10. In the present case, Mr Fitzgerald on behalf of the prosecution has, in very effective submissions, if we may say so, sought to persuade us that the circumstances here were such that there was no unfairness which could justify the exclusion of this material. He points out that the material was in fact submitted to the appellant's solicitors in December when the prosecution evidence was served for the purposes of trial, and the defence case statement, which was provided for the court some six weeks later, did not seek to challenge on its face at any rate what was allegedly said by the appellant to Detective Constable Draycott. He submits that the appellant accordingly had had ample opportunity to consider the consequences of what was said by Detective Constable Draycott and an opportunity accordingly to comment on it and made no comment until the trial itself, when he challenged what was said in the way that we have indicated. He reminds us that the judge made an express finding in his ruling that the Detective Constable had acted in good faith. He submits that this is a case different from such cases as Keenan. This is not a case where the appellant is denying that there was a conversation at all, he is only denying a short passage in that conversation. The circumstances surrounding the offence suggest, he submits, that when the parts of the statement that are accepted by the appellant are put in the context of the other facts, it is inconceivable that the jury's ultimate verdict could be anything other than safe because of the implausibility of the appellant being able to say that he played no part in the matter, given the fact that he knew that there was to be an attempt to intimidate a witness, he having been asked to do exactly that the day before. He submits, therefore, that in all the circumstances the judge's ruling was not one with which we could properly interfere and that the verdict is a safe verdict.

11. The problem, it seems to us, with that submission is two-fold. First, the mischief to which paragraph 13.4 of the Code is concerned is to ensure that there is no possibility of there having been a linguistic misunderstanding in relation to what was said and its meaning in English. There is nowhere in the material that was provided for the court any transcription of what was said in Portuguese. That seems to us to have been of particular significance bearing in mind the second point, which is that it was not until some two months or so after the alleged conversation that the appellant was given any opportunity to consider and comment on what was allegedly said. It seems to us in those circumstances that the possibility of unfairness could not be excluded arising out of misunderstanding, bearing in mind the finding of bona fides, and that this was a classic example of a case where the appellant should have been given the benefit of any concern, which we believe is rightly raised by the circumstances of this particular statement.

12. It follows that we consider that the ruling by the judge was wrong and we cannot exclude the possibility that the statements allegedly made to Detective Constable Draycott had an effect on the jury's conclusions. The position, accordingly, is that we are unable to say that the conviction is safe and we allow the appeal.

13. MR FITZGERALD: My Lords, I do not know if your Lordships have considered directing a re-trial in this case.

14. LORD JUSTICE LATHAM: Have you received specific instructions in that respect, Mr Fitzgerald?

15. MR FITZGERALD: I have.

16. LORD JUSTICE LATHAM: That is your submission.

17. MR FITZGERALD: Yes.

18. LORD JUSTICE LATHAM: Mr McDonald?

19. MR MCDONALD: Well, from what I understand, the main offence has actually been tried and the witness herself has given evidence in that main offence.

20. LORD JUSTICE LATHAM: Yes.

21. MR MCDONALD: And I think there was a conviction out of that trial, to which this appellant was not obviously involved in. So from the point of view of the public interest one could argue, and there is an argument for saying, that the matters have now been dealt with and things have moved on, particularly in relation to the complainant in this matter. She, of course, will be required to give evidence again, therefore unearthing what may have been a very traumatic experience again.

22. LORD JUSTICE LATHAM: I doubt if she would be needed for a re-trial.

23. MR FITZGERALD: She was not needed for the original trial.

24. LORD JUSTICE LATHAM: I did not think she was. Mr McDonald, that is not a particularly powerful point.

25. MR MCDONALD: So be it. The second part of it is of course the extent of time that the appellant has now served in this matter, 12 months so far -- I was doing a small calculation.

26. LORD JUSTICE LATHAM: About 14 months, is it not?

27. MR MCDONALD: I say that he has 12 months left to serve, that is my calculation, without taking any instructions. He was sentenced on 5th June. I am presuming that he was not in custody on 5th June when he received 42 months. Of that, of course, he has to serve 21 months.

28. LORD JUSTICE LATHAM: He was probably in custody because he had 27 days -- I think he will have been in custody from 9th May.

29. MR MCDONALD: My Lord has information that I do not have. That being the case, I would say approximately 11 months to serve of the remainder of his sentence. What we have to take into account, of course, is the matter now coming up for re-trial.

30. LORD JUSTICE LATHAM: He has served the equivalent of 18 months.

31. MR MCDONALD: Yes. There is an issue as to whether the sentence itself was too long in any event.

32. LORD JUSTICE LATHAM: Thank you very much.

33. Do you want to reply to that, Mr Fitzgerald?

34. MR FITZGERALD: My Lord, no, save for the sake of clarity, the Crown submit it is in the interests of justice for there to be a re-trial, leaving aside for a moment the issue of how long the sentence was, because that of course can be addressed if he was to be convicted as far as this count is concerned, that could be addressed as far as the trial judge would be concerned, the sentencing judge, upon conviction, but the conviction itself is an important matter to address of itself.

35. LORD JUSTICE LATHAM: We will retire to consider.

(The bench retired for a short time)

36. LORD JUSTICE LATHAM: The prosecution has submitted to us that a re-trial would be appropriate. We have considered the matter and have concluded that in these circumstances justice does not require a re-trial.