

COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

CRI/VBI/195/8/2018

BETWEEN:

REGINA

AND

**RANDOLPH TORRIANO BAIN
TANIKO TURNER
TYRELL HIGGS**

Before: The Honourable Mr. Justice Gregory Hilton

Appearances: T'Shura Ambrose along with Randolph Dames for the Crown

**Eleanor Albury for Randolph Bain
Allen Emmanuel for Taniko Turner
Keevon Maynard for Tyrell Higgs**

Decision on Voir Dire

1. On 2nd March 2020 this court empanelled a jury to commence the trial of the Defendants on the charges of Armed Robbery, Attempted Housebreaking and Possession of an Unlicensed Firearm and Ammunition.
On 12th March 2020 the Crown having taken the evidence of 13 witnesses applied to the court to have entered into evidence a video of a Record of Interview and a caution statement (confession) made by the Accused Tyrell Higgs to D/Cpl. 3478 David Rolle in the presence of D/C 3307 Newbold on 20th July 2018.
2. The accused Tyrell Higgs through his counsel Keevon Maynard challenged the admissibility of the Record of Interview and Caution Statements on the basis of oppression and abuse meted out to him by D/Cpl. Rolle, D/C Newbold and other unnamed officers and alleges that what was contained in the Record of Interview (which he refused to sign) and caution statement (which he did sign) was untrue and he only stated what was contained in them because he was told to do so by the officers and as a result of the treatment he received at the hands of the police prior to the Interview and caution Statement.
3. The prosecution contends that the record of Interview and Statement were given voluntarily by the accused, without oppression, abuse, inducement or force and were not obtained unfairly and should be admitted into evidence along with the video recordings of both the Record of Interview and Statement.
4. The Court entered into a Voir Dire and heard seven witnesses in the absence of the jury; six for the Prosecution and one for the Defence (the Accused Tyrell Higgs) to determine the admissibility of the Record of Interview and statement.

5. At the outset I am of the view that the unsigned Record of Interview of the Accused cannot be admitted into evidence. However, depending upon the determination of the issue of voluntariness, the video recording of the Record of Interview would be allowed if I find that it was conducted voluntarily.
6. The issue to be determined on the Voir Dire is: should the Record of Interview and confession statement made by Tyrell Higgs be excluded as having been given in circumstances of oppression or as a result of anything said or done or omitted to be said or done by the police which would render the Record of Interview and statement unreliable.
7. Counsel for Tyrell Higgs raised essentially two areas of objection to the admissibility of the Record of Interview and Statement:
 - a) That Tyrell Higgs' participation in the Record of Interview and Statement was acquired by an inducement held out to him by D/Cpl. Rolle that if he did so he would be released.
 - b) That the Accused participation on the Record of Interview and statement was acquired as a result of beating meted out to him by the police on 20th July 2018 prior to the Record of Interview and Statement being taken.

THE LAW

8. The Court has considered the Law, as it relates to this issue, contained in sections 20 (1), (2) and (5) and 178 (1) of the Evidence Act.

Section 20 of the Evidence Act reads as follows:

20. (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 fact in issue in the proceedings and is not excluded by the court 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 -

- a) was or may have been obtained by oppression of the person who made it; or
- b) is rendered unreliable by reason of anything said or done or omitted to be said or done in the circumstances existing at the time, the court shall not allow the confession to be given in evidence against him except 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.

(5) In the Act –

“Confession” includes 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;

“Oppression” includes torture, inhuman or degrading treatment, and the use of threat of violence (whether or not amounting to torture).

Section 178 of the Evidence Act Reads as follows:

178. (1) In any criminal proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including, the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not admit it.

(2) Nothing in this section shall prejudice any rule of law requiring a court to exclude evidence.

9. The term 'oppression' has been said to include according to Sachs J. in Note to R v. Prestly 51 Cr. App.R. 1.

"Things such as length of time of any individual period of questioning Whether the accused person has been given proper refreshments or not"

He describes it as "something which tends to sap, and has sapped, that free will which must exist before a confession is voluntary."

In R.V.Fulling [1987] Q.B.426 Lord Lane at 452 paragraph F – G had this to say regarding the term oppression:

"This in turn leads us to believe that Oppression in section 76 (2) (the equivalent to our S.20 (2) (a) should be given its ordinary dictionary meaning. The Oxford English dictionary as its third definition of the word runs as follows: **"Exercise of authority or power in a burdensome, harsh or wrongful manner; unjust or cruel treatment of subject, inferiors etc; the imposition of unreasonable or**

unjust burdens.” One of the quotations given under that paragraph runs as follows: “There is not a word in our Language which expresses more detestable wickedness than oppression”. We find it hard to envisage any circumstances in which such oppression would not entail some impropriety on the part of the interrogator.”

THE EVIDENCE

10. In Brief the Prosecution’s case on the Voir Dire is that sometime after 2 a.m. on the 19th July 2018 the Accused was arrested in a utility room of a residence off of Jerome Avenue New Providence by Police officers without incident. He was taken to the Wulff Road Station to be booked in and later transferred to the Carmichael Road Police Station where he remained until 8 a.m. on the 20th July 2018 when he was taken to the Central Detective Unit (C.D.U.) and kept in the cell block until around 12 noon when he was interviewed by D/Cpl. David Rolle in the presence of constable Newbold and voluntarily participated in a Record of Interview and gave a caution statement.
11. Sgt. 2529 Roman Johnson gave evidence that he saw Tyrell Higgs shortly after he had been arrested by P.C. Jamal Rolle. He said he looked at him for about one minute while he was in a Patrol car and that he didn’t see any injuries on Tyrell Higgs and only noticed that he was sweating.
12. P.C. 2823 Jamal Rolle gave evidence that he arrested Tyrell Higgs in a utility room of a building off of Jerome Avenue around 3 a.m. on 19th July 2018. That Tyrell Higgs was sweaty and appeared out of breath; but he saw no injuries on him and did not seem to need any medical attention. He said when he arrested Tyrell Higgs, Higgs said “Boss I ain’t know what going on. I only catching a ride.”

13. Cpl. 3407 Kevin Deveaux testified that his only involvement was in recording the Record of Interview and caution statements of Tyrell Higgs. He produced the D.V.D. recording which was played during the Voir Dire. He said he heard no inducement being offered by Tyrell Higgs and witnessed no one beat Tyrell Higgs.
14. Cpl. 2818 Janardo Orgall testified that on 20th July 2018 sometime after 4 p.m. he was instructed by D/Cpl. 3478 David Rolle to photograph Tyrell Higgs. He complied and he produced a C.D. of the photograph he took which was displayed in court during the Voir Dire. He said he never saw any officer commit any act of violence on Tyrell Higgs and he saw no injury or marks on him.
15. The evidence of Dr. Basil Dukerand is that Tyrell Higgs was admitted to the Bahamas Department of Corrections on 23rd July 2018 and he saw and examined him on 25th July 2018. He said the accused claimed he was beaten by the police and produced the Prison Admission Medical Form which noted mild tenderness to the left lateral chest of Tyrell Higgs and also handcuff abrasions to both wrists of the Accused.

He testified that while he could not say how the mild tenderness occurred it was possible from blunt trauma or force being applied to area.

Under cross-examination he said it was possible that the mild tenderness could have been more severe 5 days earlier and in re-examination opined that it was possible that the mild tenderness could be caused if a person laid on a hard floor for a long period of time and it may also be possible to be self – inflicted.

With respect to the wrist abrasions he testified that these occurred by handcuffs being applied too tightly on each wrist and being forcibly moved on the hands which would have caused the abrasions.

He saw no other injuries on the accused and described him as a healthy male and provided him with no prescriptions.

16. D/Cpl. 3478 David Rolle gave evidence that he was the officer who conducted the record of Interview with the accused and took the caution statement from him on 20th July 2018 in the presence of Constable Newbold.

He stated that he saw the Accused shortly after 12 midday on 20th July 2018 and the Accused agreed to participate in a Record of Interview and give a statement. He said he took the Accused to the interview suite and cautioned him and advised him of his right to an Attorney and the Accused stated he would continue the interview without an Attorney. The record of Interview was video recorded but the Accused declined to initial his answers or sign it. Cpl. Rolle said the Accused agreed to give a written statement which was also video recorded and the recording was played at the Voir Dire. This statement was signed by the Accused.

Cpl. Rolle stated that prior to the Record of Interview the Accused made no complaints to him. That the Accused participated in the Record of Interview and gave the statement voluntarily. He stated that neither he or anyone in his presence beat the Accused at any time before, during or after the Record of Interview or statement. He specifically stated that he did not fish bag the Accused, did not punch him or handcuff him tightly and throw him on the ground and stomp him about his chest and back. He also said he never offered any inducement to the Accused or tell him he would release him if he gave a statement.

Cpl. Rolle stated that he saw a small scratch on the Accused face when he interviewed him and the Accused said it was caused by the arresting officers while he was being arrested. He said he instructed Cpl. Orgall to photograph the Accused due to the injury to his face to protect himself from any future allegation and when he viewed the photo of the Accused in court close up he says, the scratch was on the right cheek area on the Accused.

Under Cross-examination he said he did not know when the Accused was brought to C.D.U. as the first time he interacted with him was when he took him out of the cell block shortly after 12 midday to commence the interview process.

He denied offering any inducement to the Accused and denied he or any officer in his presence beat or abused the Accused by putting a fish bag over his head; beating him on the ground while he was handcuffed and stomping on his chest. He reiterated that the Record of Interview was conducted fairly and the statement given by the Accused was voluntary.

17. The Accused Tyrell Higgs gave evidence in the Vior Dire. He stated that he did not commit any offence and that on the early morning around 2 a.m. on 19th July 2018 he was dropped by the gas station on Mackey Street and was walking to see his girlfriend who lived on Kemp Road when he heard a gunshot and ran onto Jerome Avenue.

He said he hid in a utility room of a house off Jerome Avenue where he was found by a police officer and arrested and taken to Wulff Road Police Station and then to Carmichael Road Police Station where he was kept until around 8-9 a.m. on the 20th July 2018 when he was taken to C.D.U. He stated that shortly before 12 noon Cpl. Rolle passed by the cell and told him "I coming to you to start on you now."

He stated that shortly thereafter Cpl. Rolle took him out of the cell and took him to a room which had a plaque over the door reading "Homicide". He said he was asked by Cpl. Rolle to say why he was in the area where he was arrested and that he told Cpl. Rolle he was going to see his girl. Cpl. Rolle said he was Lying.

That Cpl. Rolle then took him into a private room and Cpl. Rolle along with constable Newbold and other officers began to abuse and beat him. He detailed the abuse as having a fish bag placed over his head preventing him from breathing and being thrown on the floor and tightening his hand cuffs and the officers beat him by punching him and stomping on him while he was on the floor. That Cpl. Rolle told him the beating would

stop if he told him to say he was in the car with other persons who were arrested. That what is contained in the Record of Interview and Statement was not true and were not conducted voluntarily.

He also said Cpl. Rolle told him he would be released if he gave a statement.

Under cross – examination he denied he was being untruthful about being beaten. He denied that the allegations of beating was a recent fabrication. He admitted that he did not tell the Magistrate he was beaten nor the judge at his various case management hearings and said he was unaware he had to tell the judge he was beaten.

When questioned about his demeanor in the video recordings of his statement he said he was in pain at the time and only smiled when Cpl. Rolle corrected his spelling.

He reiterated that he was beaten about his chest and ribs and had the handcuffs squeezed tightly on his wrists.

He said that while no footprints were seen on his shirt, in the picture taken of him there were dirt marks on the shirt where he says he was stomped by the police.

He denied self – inflicting the injuries he received.

ANALYSIS

18. On the evidence considered there were three injuries that the Accused was seen to have after he was taken into custody after his arrest. At the time of his arrest the two officers on the scene of his arrest saw no injuries on him on 19th July 2018.

Cpl. Rolle testified that when he interviewed the Accused on 20th July 2018 he had a scratch on his face. No other officer or the Doctor testified to seeing this injury.

The arresting officers said that there was no incident of resisting arrest.

With respect to the mild tenderness to the chest the Dr. testified that this may be equivocal. The Accused said he was beaten by the police and stomped on. The Doctor testified that the mild tenderness he found when he examined the Accused

on 25th July 2018 could have been caused by blunt trauma or force applied to the area and opined that it could have been worse 5 days earlier on 20th July 2020. He also said it was possible that it could occur by the Accused laying for a long period of time on a a hard floor or be self – inflicted. There is no evidence led that the Accused was laying on a hard floor when he was admitted to prison.

With respect to the abrasions on both of the wrists of the Accused. The Doctor stated that these were caused by the handcuffs being tightly applied and some forcible movement on them.

Counsel for the Prosecution referred to the Bahamas Court of Appeal case of *Bowe v. R.* 1999 BHS J No 36 at paragraph 37 where the Court of Appeal stated:

“The evidence of the doctor is that the injury could have been self-inflicted. We do not agree that an injury, however minor, which is not explained by the police would automatically lead to a statement allegedly given by the Defendant being held inadmissible. The totality of the evidence led by the Prosecution and the Defence would have to be considered. Each ruling would depend on the facts of the particular case.”

Prosecuting Counsel submitted that the injuries in this case were minor and could have been self – inflicted and as such the record of Interview and Statement should be admitted as being voluntary.

19. As stated earlier section 20 (2) (b) of the evidence Act provides that:

“.....the court shall not allow a confession to be given in evidence except 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.”

The Doctor's evidence is that the Accused claimed he received the injuries as a result of being beaten by the police. The police have given no explanation as to how the Accused was found by the Doctor to have suffered the abrasions to both wrists and suggest that the mild tenderness to the ribs of the Accused could have been self-inflicted.

20. In circumstances such as this I find the statements of George JA in *Mott v. A.G.*[1996] BHS J No. 113 to be applicable.

He stated at para: 17 and 21 as follows:

17. The case against the first appellant is however not quite so clear cut. The evidence is that he was unharmed when he went to the Fresh Creek Police Station at about noon on 29th September and that when he was received in the prison on 3rd October he was suffering from injury to his right leg in the form of an abrasion and acute spasms, injuries which the doctor must have deemed serious for he ordered him to be transferred to the sick bay and prescribed among other medications tetanus toxoid and very strong doses of pain – killers. The police say they inflicted no injury on the appellant. And as the trial judge did not believe his evidence, there is no explanation of how he received the injuries that the doctor found. And needless to say the burden is on the prosecution to prove beyond reasonable doubt that an accused's statement was free and voluntary. Although disbelief of the defence can lend support in the discharge of that burden, this is not always the case. The unanswered, and therefore the unsatisfactory part of the case for the prosecution, is the lack of explanation of the injuries the doctor found that the appellant was suffering from when he left the custody of the police. As was so rightly and admirably put by Georges C.J. in the unreported case of *R. v. Moss* at p. 4:

“It appears to me reasonable as a general principal to state that whenever an accused person who has been in custody for some time is found to be suffering from injuries which are consistent with the application of force by the police, that there should be some explanation from the police as to how these injuries came to have been suffered. There are a number of ways in which such injuries could have been sustained – there could have been resistance on arrest, there could have been some altercation with a fellow accused – but once a prisoner in custody does suffer from injuries for which no credible explanation is given then I cannot be certain that these injuries were not inflicted by the police and in those circumstances it is quite impossible to be satisfied that any statement made by the accused is voluntary.”

21. And in the case of the State v. Sattaur & Mohammed (1976) 24 WIR 157 Haynes, C. said inter alia at p. 161 that “it was not necessary to find that the police did any of the things (threats, assaults, promises of release) alleged, in order to exclude the statement, as it was sufficient if he found he was not satisfied they did not. “In support of this proposition he referred to the observations of Williams J. in the Australian case of Smith v. R. (1956) 97 C.L.R. 100 who said inter alia at p. 130 that “it is not necessary to find that the police did any of these things, it is sufficient not be satisfied that they did not.” And After citing R.v. Rampersaud (supra) the Chancellor said that “ (the judge) would not be justified in finding the statement voluntary and so admissible just because he doubted the

veracity of the accused or could not regard him as a witness of truth”;

21. Even if the version alleged by the Accused is not accepted (and I believe he may have exaggerated) undoubtedly, injury was suffered by Tyrell Higgs while he was in police custody during the period in which the record of Interview and the confession statements were obtained. No satisfactory explanation has been given to dispel reasonable doubt as to whether it rendered any confession unreliable.

It does not matter how slight the injury – if it is a cause for the confession being given – it is inadmissible.

22. While it is possible that the mild tenderness found by the Doctor to the left lateral chest area of Tyrell Higgs could have been self-inflicted, there is no direct evidence of this. And the abrasions to the wrists of the Accused were definitively stated by the doctor to have been caused by Police handcuffs being tightly applied and roughly moved on the hands of the Accused. The Police have given no explanation or even suggestion of how those injuries occurred while the Accused was in their custody.

23. Accordingly I find that the Prosecution has not discharged its burden of proof (under section 20 (2) (b) of the Evidence Act) beyond reasonable doubt that the record of Interview and Statement of the Accused (notwithstanding that it may be true) was not obtained in circumstances of oppression or was not rendered unreliable by the actions of the police.

Consequently the Prosecution will not be permitted to lead any evidence regarding the record of Interview and statement of Tyrell Higgs in the trial before the jury.

Dated this 16th March 2020

The Hon. Mr. Justice Gregory Hilton