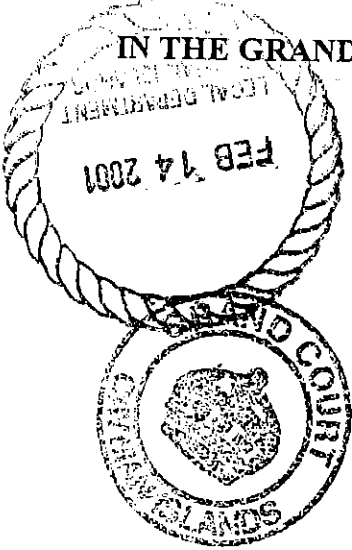


Mr. Bulgin
9/1/2001



IN THE GRAND COURT OF THE CAYMAN ISLANDS

INDICTMENTS 39A & B/00

R.

v.

- (1) BRIAN R. POWELL**
- (2) KURT F. EBANKS**

DEFENDANTS

Appearances:

Counsel to the Applicant, the Reverend Dee Dee Haines:
Mr. Ross McDonough of Bruce Campbell & Co.

Counsel to the Respondent: Sam Bulgin, Solicitor General for the Crown

Counsel to the Second Respondent, Kurt Ebanks: Mr. St. John Stephens

Before Henderson, J.
January 8th and 9th, 2001

RULING

When the Reverend Dee Dee Haines was ordained as a Minister of the United Church, she made a solemn vow before God to preserve the confidentiality of any confession by a penitent. Kurt Ebanks is charged with a planned and deliberate murder. There is reason to believe he has confessed his role in the killing to Reverend Haines. The Crown has served a Witness Summons upon her. She now applies to set it aside, arguing that any relevant evidence she could give is protected by a priest-penitent privilege. When I gave

my ruling orally during the course of the trial, I said I would provide these written reasons for it in due course.

Facts

The body of Curtis Seymour was found lying in a dumpster on the morning of January 18th, 2000. The Crown says that Mr. Ebanks and his co-defendant, Brian Powell, robbed Mr. Seymour of \$63.00 and then killed him because he was the only witness to their crime. Each defendant has made a statement to police admitting his role in the robbery but alleging that the other defendant killed Mr. Seymour. Each has denied any common enterprise or joint intention to commit murder.

The Reverend Haines was ordained as a Minister in the United Church of Christ on May 31st, 1998 in the United States. When she took her ordination vows, she was asked "will you keep silent all confidences shared with you?" and replied "I will, relying on God's grace." The obligation of confidentiality is also contained in the Code of Ethics of the United Church.

Confession, in the United Church, is not a weekly ritual and is not confined to any particular place, sanctuary or office. Nevertheless, it assumes a fundamental role in the spiritual life of a member of that Church and the hearing of confessions is an important aspect of pastoral care. Parishioners making confession or seeking spiritual counselling are advised routinely that what they say will be kept confidential.

Since September, 1999, the Reverend Haines has been serving as Minister of the John Gray Memorial Church on Grand Cayman Island. This is a congregation of the United

Church in Jamaica and the Cayman Islands. Its traditions are Presbyterian. Patoral care is an important part of the Reverend Haines' duties; she receives confessions of sin and confidences from her parishioners on a regular basis.

Julie Harris is a former girlfriend of Mr. Ebanks. Shortly after the death of Curtis Seymour, he told her that he had been at the scene of a murder and knew something about it. He said he was going to talk to a woman at a church attended by one of his friends. Shortly after that conversation, Mr. Ebanks introduced himself to the Reverend Haines and had a long conversation with her. They were previously unacquainted. She began the conversation by assuring Mr. Ebanks that everything he said would be held in confidence.

The Crown has reason to believe that Mr. Ebanks confessed his role in the killing to the Reverend Haines. Counsel to the Reverend Haines, although he has revealed nothing of the content of the conversation, asks this Court to assume that the Crown's thesis is correct. He says the Court should set aside the Witness Summons because any such admission or confession would be protected by the priest-penitent, or religious communications, privilege. Consequently, I approach this ruling on the footing that Mr. Ebanks has made an important, and self-incriminating, admission to the Reverend Haines about his role in the killing. I also assume that he made this confession in the course of seeking spiritual guidance and counselling.

Issues

The Reverend Haines says that this Court should recognise and give effect to a general or class privilege protecting all priest-penitent, or religious, communications without regard

to case-by-case considerations. On this basis, there is no need for the Court to know anything of the content of the communication before determining that it is inadmissible.

The Crown argues that no general or class privilege exists. There is no case authority in the Cayman Islands for or against the existence of the privilege. The Crown concedes that the Court has a discretion, to be exercised according to the particulars of an individual case, to refuse to compel a priest or minister to answer questions even where the answers might be relevant. The Crown requests that a voir dire be held for the purpose of determining whether or not my discretion should be exercised in this case.

Is there a general or class privilege protecting priest-penitent communications?

It is reasonable to infer that, prior to the Reformation, English courts recognised an absolute privilege for priest-penitent communications. A number of papal pronouncements throughout the Middle Ages emphasised the importance of keeping secret what was communicated in the confessional. The Code of Canon Law of the Roman Catholic Church imposes an obligation of secrecy which is inviolable. It is a Canon Law offence for a priest to betray the confidence of a penitent for any reason whatsoever, in any way. Deliberate betrayal of the obligation of secrecy results in automatic excommunication. This history is canvassed in detail in **Araujo, R. J.**; "International Tribunals and Rules of Evidence: the Case for Respecting and Preserving the "Priest- Penitent" Privilege Under International Law"; (2000) 15 **Am. U. Int'l L. Rev.** 639; also see **Mazza, M. J.**; "Should Clergy Hold the Priest-Penitent Privilege?"; (1998) 82 **Marq. L. Rev.** 171.

One can easily infer that, before the break with Rome in 1531, English judges would have refused to compel a priest to testify about what a penitent had said. Yet, even in those early times, the rule may have been subject to an exception: a passage in Best on Presumptive Evidence (at page 596) suggests that the privilege would be set aside in cases of high treason. Coke's opinion was the same: see the annotation following **R. v. Hay (1860) 2 F. & F.S. 933.**

Anglican Church tradition imposes a similar secrecy obligation. In the 1950s, the Archbishop of Canterbury reaffirmed this principle of secrecy by way of a Church Resolution: **Araujo**, op. cit., page 62.

All 50 American states together with 4 Australian states, New Zealand, Quebec, and Newfoundland have adopted some form of the priest-penitent privilege in legislation. There is no such legislation in the Cayman Islands or in the United Kingdom.

In light of the lack of legislative support for the privilege in the United Kingdom and the absence of authoritative judicial support for its existence, most commentators doubt that a general or class privilege for priest-penitent or religious communications was recognised at common law: see Cross on Evidence, 7th edition, London, 1990, page 447; Blackstone, 8th edition, paragraph F9.8, page 2022; and Archbold, 2001 edition, paragraph 12-22, page 1253.

Applicant's Authorities

The argument advanced for the existence of a general or class privilege hangs by the slenderest of threads. The Reverend Haines relies upon the following authorities.

In Broad v. Pitt (1828) 3 Cox 518, Chief Justice Best said, "I, for one, will never compel a clergyman to disclose communications made to him by a prisoner...". His remark is immediately preceded by a statement that there is no privilege protecting such communications (but his authority for that statement - **R v. Gilham (1828) 1 Mood. 186** - does not support the assertion).

In R. v. Griffin (1853) 6 Cox 219, Alderson, B., intimated to the prosecution that a confession of murder made to a spiritual advisor "ought not to be given in evidence." He also said, "I do not lay this down as an absolute rule." Crown Counsel then said, in deference to the intimation, that he would not tender the evidence.

In R v. Hay, *supra*, Hill, J., compelled a Roman Catholic Priest to reveal the identity of a penitent from whom he had received a stolen watch. It was received "in connection with the confessional." In ordering the Priest to answer (and subsequently committing him to jail for contempt), Hill, J., made a repeated distinction between a request to disclose something a penitent said in the confessional and a request to reveal the identity of a penitent. The case contains an implication, but nothing more, that the Court recognised a privilege for priest-penitent communications.

Ruthven v. DeBour (1901) 45 S.J. 272 was also cited by the Reverend Haines. The case does not appear, however, to involve the purported existence of a privilege at all. The questions which the Court found objectionable had to do with the usage of the Roman Catholic priesthood in hearing confessions.

Respondent's Authorities

In arguing against the existence of a general or class privilege, the Crown begins with **Broad v. Pitt**, supra, in which Chief Justice Best stated categorically that there is no priest-penitent privilege in the common law.

In **Wheeler v. Le Marchant (1881) 17 Ch. D. 675, at 681**, Jessel, M.R., said in obiter dicta that communications to a priest "in the confessional" are not protected by privilege.

Normanshaw v. Normanshaw (1893) 69 L.T. 468 is an oral ruling in a matrimonial case holding that no general privilege exists, and that "each case of confidential communication should be dealt with on its own merits."

Attorney General v. Mulholland and Foster [1963] 2 Q.B. 477 (C.A.) holds that journalists do not enjoy a privilege protecting the identity of their sources. In the course of examining this question, Lord Denning, M.R. (with whom Donovan, L.J., and Danckwerts, L.J., agreed), said (at page 489) said in obiter dicta that a member of the clergy enjoys no privilege which would permit her to refuse to answer relevant questions. The Court noted that a member of the clergy, like an attorney, journalist, banker or doctor, will not be directed to answer a question unless it is relevant, proper, and necessary to the course of justice.

This judgment was considered and applied by the House of Lords in another case involving a journalist - **British Steel Corporation v. Granada Television Ltd. [1981] A.C. 1096**, at pages 1168-69. Lord Wilberforce said there:



"Thirdly, as to information obtained in confidence, and the legal duty, which may arise, to disclose it to a court of justice, the position is clear. Courts have an inherent wish to respect this confidence, whether it arises between doctor and patient, priest and penitent, banker and customer, between persons giving testimonials to employees, or in other relationships. A relationship of confidence between a journalist and his source is in no different category: nothing in this case involves or will involve any principle that such confidence is not something to be respected. But in all these cases the Court may have to decide, in particular circumstances, that the interest in preserving this confidence is outweighed by other interests to which the law attaches importance. The only question in this appeal is whether the present is such a case." (underlining added)

Later, Lord Wilberforce mentioned (at page 1171) that "disclosure must be necessary to enable justice to be done" (also see *In Re An Enquiry* [1988] 2 W.L.R. 33 at page 42 ff.; affirmed by H.L., at page 60).

The Supreme Court of Canada has rejected the existence of any religious communications privilege of automatic application. That Court has held that any objection to answering on this ground should be assessed on a case-by-case basis: *R. v. Gruenke* [1991] 3 S.C.R. 263.

Conclusion

I conclude that the law of the United Kingdom does not, and has not since the time of the Reformation, recognised any general or class privilege for priest-penitent, or religious, communications. The weight of English authority is against the proposition.

The legislature of the Cayman Islands has, in the **Evidence Law (1995 Revision)** codified a number of the rules of evidence. That Law makes no mention of the priest-penitent relationship.

Counsel to the Reverend Haines has advanced a number of arguments in the realm of social policy in the course of inviting this Court to create a privilege in the Cayman Islands for priest-penitent communications. As arguments in favour of a general or class privilege, I do not find them persuasive. The modern trend in the law of evidence is to prefer a principled approach to individual evidentiary objections over rules of automatic exclusion.

The issue is best approached on a case by case basis. An answer will not be compelled unless, as the Court of Appeal said in **AG v. Mulholland**, *supra*, the answer is relevant, proper, and necessary to the course of justice.

The Court retains an overriding discretion to refuse to compel a witness to answer where to do so would be to violate a confidence: **Hunter v. Mann** [1974] 1 Q.B. 767 (C.A.); **R v. Payne** [1963] 1 W.L.R. 637 (C.A.). The **Evidence Law (1995 Revision)** s. 28 permits a court to exclude evidence in a criminal proceeding where its admission would operate unfairly against a defendant. Such unfairness may arise where admission of the evidence would violate a confidence. Whether the court's discretion will be exercised in favour of exclusion will depend upon a consideration of all of the circumstances, including the nature of the confidential relationship and the probative value of the evidence.



In some cases, it may be seen clearly, without the need for a voir dire, that a member of the clergy should not be compelled to violate a confidence. This is not such a case. In view of the gravity of the charge and the high probative value that evidence of a confession might have, the Crown has satisfied me that a voir dire is appropriate. Once all the relevant circumstances are known, the parties will be at liberty to contend for or against the exercise of a discretion in this case.

The Reverend Haines will be obliged to testify during the voir dire as to the content of the communication. There is no other way to determine the probative value of anything Mr. Ebanks may have said and that is an important component of the balancing of interests that must take place.

On an exceptional basis, the public and the media may be excluded from the courtroom where that is necessary in the interest of justice: *Scott v. Scott* [1993] A.C. 417. This voir dire will be held in camera, in the absence of both the media and the public, so as to protect the confidentiality of the communication should it not be admitted in evidence.

The application to set aside the Witness Summons is dismissed.



Sunderman J

per.

A.G. Henderson
Judge of the Grand Court (Actg)

Dated the 9th January, 2001