IN THE GRAND COURT OF THE CAYMAN ISLANDS
CRIMINAL SIDE

IND #0030/2019

REGINA

V

BARTON ELSWORTH RIVERS
DENO KALIFA MCINNIS
JONATHAN ASHLEY MOORE
NICKARTHUR ROMANE SANDERSON

Appearances:	**Mr. Scott Wainwright for the Crown**
	Mr. Keith Myers for Defendant Barton Rivers
	Ms. Lee Halliday-Davis for Defendant Deno McInnis
	Mr. Jonathon Hughes of Samson Law for Defendant Jonathan Moore
	Mr. Oliver Grimwood of Barton Attorneys for Defendant Nickarthur Sanderson
Before:	**Justice Marlene I. Carter (Actg.)**
Hearing Date:	**8th July 2020**
Delivery of Decision:	**9th July 2020**

HEADNOTE

Criminal Law – Conspiracy to import ganja *– Ruling on Voir Dire – Section 40 of the Evidence Law – Right to be informed of entitlement to legal representation – Waiver of Rights -*

JUDGMENT ON VOIR DIRE

1. The third defendant, Jonathan Moore, was arrested on 23rd June 2018 on suspicion of importing ganja and was interviewed under caution on the same date.

2. The third defendant has made an application for the court seeking the exclusion of his record of interview pursuant to s.40 of the ***Evidence Law (2019 Revision)***, on the basis that its inclusion in evidence would operate unfairly against him by prejudicing his right to a fair trial. Section 40 states:

> *"Nothing in this Law derogates from the power of a court in any criminal proceeding to disallow evidence otherwise admissible which, in the opinion of such court, would, if allowed, operate unfairly against an accused person."*

3. Counsel for the 3rd defendant stated that there was a clear infringement of the defendant's right under s.5(4) of the ***Bill of Rights*** (Personal Liberty) which codifies the rights of individuals arrested pre-charge. Section 5(4) states:

> *"Any person who is arrested or detained shall have the right, at any stage and at his or her own expense, to retain and instruct without delay a legal practitioner of his or her own choice, and to hold private communication with him or her..."*

THE RECORD OF INTERVIEW

4. The third defendant was interviewed under caution on the day of his arrest by DC 418 Dwayne Simpson (DS) and DC 426 Ricardo Lauder (RL) at the Prisoner Detention Centre at Fairbanks.

5. The salient aspects of the interview were set out at pages 112-114 of the trial bundle. The following exchange took place between the third defendant and the two police officers conducting the interview at the commencement of the record of interview:

"DS: *...we talked to you earlier and you said that you wouldn't need a lawyer present.*

JM: *I have a lawyer*

DS: *At the time, right, is there any reason you do not need your lawyer to be present Sir?*

JM: *Is any reason wah, repeat the question*

DS: *Is there any reason...*

JM: *Uh huh*

DS: *Do you, that you do not need a lawyer to be present at this particular time*

JM: *No special reason*

DS: *Okay well I must inform you we have free legal advice, do you want to speak to a free legal advisor, a free attorney, a free lawyer before we commence the interview*

JM: *Can proceed*

DS: *Okay Sir*

RL: *Remember you know Mr, umm, sorry to cut you Mr. Simpson, remember this is an ongoing, and continued right at any point in time you wish to speak to an attorney Mr. Moore it's your right to do so, indicate to Mr. Simpson or myself and you will be given the privilege to speak to an attorney, right*

JM: *(Shakes head)*

RL: *I always want you to remember that you will be given this opportunity, alright?*

JM: *(Shakes head)*

RL: *Okay so you want to go ahead without an attorney at this time?*

JM: *Yeah"*

6. Further on during the interview the following exchange was also made:

"DS: *So we gave you the chance to call or speak to an attorney you said you do not need an attorney present at the moment, is that correct*

JM: *Yeah that correct*

DS: *Alright so you are ready to go on with the interview then.*

JM: *Yeah cool"*

THE DEFENDANT'S EVIDENCE ON VOIR DIRE

7. The defendant's evidence in chief was to the effect that when he said to the police that he had a lawyer, he was referring to a Mr. Collins "*a lawyer I worked with before, who helped me previously*."

8. He stated in answer to his counsel that when the Police indicated to him that "we have free legal advice, "a free legal advisor, a free attorney, a free lawyer" with whom he could speak before the interview commenced "*I took it to mean I would be given a lawyer of their choice I was not content with that*."

9. He further stated that when he agreed to proceed with the interview it was because he was under the impression that this was the only choice available to him and that he "*would have reached out to him to continue if I had been told that Mr. Collins was available to me*."

10. In cross examination he said:

> "*I am no stranger to the Police. I have been interviewed under caution with the Police before. Mr. Collins had represented me before and as a lawyer before at interviews. I do know how to contact him to get in touch with him. Previously I called him and he came and assisted me when I was being interviewed on a few occasions.*
> *I was not given the opportunity of a phone call.*
> *……*
> *I requested a couple of phone calls on the day...I did not stipulate who I was going to call.*
> *I knew I could call Mr. Collins ... I did not have his number at that point in time. I requested, asked for a phone call and it was refused. I don't remember which officer at this time, but officers*."

11. The Defendant confirmed that, as reflected on transcript, he told the police:

> *"I told them I did not need a lawyer. I did not mention Mr. Collins. I did not ask for Mr. Collins during the interview no. I know Mr. Collins would represent me if I called because he had done so several times."*

12. The defendant stated that he felt he was not given much of a choice:

> *"At the present time [referring to the time at which he was being interviewed] I did not need an attorney. At the time I was in a mode of shock and wanted to try to get out of there. I was arrested and wanted to get out of there. This is why I did not mention Mr. Collins. I wanted to get out of there a quickly as possible." He confirmed: "I did tell the Police that I was happy to proceed without an attorney."*

THE DEFENCE SUBMISSIONS

13. The basis of the defendant's application is that, "*having told the police that he had his own lawyer, the third defendant was not informed that he had a right to have his lawyer, that is to say a lawyer of his own choosing, contacted and provision made for a consultation and ultimately his attendance at the interview.*" The third defendant was therefore "*not fully and properly informed*" when he is said to have waived his right to legal advice. It was submitted that because the third defendant "*was not given complete and correct information about the extent of his right to legal assistance*", his "*willingness to proceed with the interview cannot be viewed as a waiver of his right."*

14. The court was referred to a number of authorities on the subject of the entitlement of a defendant to free legal advice and to the Cayman Islands case of ***R v Anderson***[1], a judgment of Henderson J., in which he found that the fair trial provisions of the ***Bill of Rights*** at s.7(1) and (2)(d), applied in the same manner pre-charge as they did subsequent to charge for the reason that:

[1] [2014 (2) CILR 60]

> *"A trial may suffer the taint of unfairness from something which occurred during the investigatory phase even though the trial itself is conducted with scrupulous procedural fairness".*

15. For the defendant, counsel submitted that while Henderson J. in ***Anderson*** had to read in the application of the right to free legal advice to a suspect when interviewed pre-charge, "*the present case is much more straight-forward as the right to retain, instruct and consult with a legal practitioner of one's own choosing is contained as an express right under section 5.*"

16. In ***Anderson***, Henderson J found that the failure to inform the defendant of her right to free legal advice coupled with her lack of experience with the criminal justice system resulted in her waiver of her right to representation being improper. The court concluded that in order for waiver to be effective, it must be voluntary, informed and unequivocal. The Learned Judge found that the effect of her right to legal advice being breached was that her record of interview was inadmissible.

17. Counsel for the defendant submitted that this court should take a similar approach if it finds that the failure of the Police to inform the third defendant of the full extent of his right to legal assistance was not complete, and not correct and, therefore, in breach of his Section 5 rights. Further, counsel submits that if the Court finds in this way, then the defendant's waiver of his right to counsel would be invalidated.

THE CROWN'S SUBMISSIONS

18. The Crown submitted that ***Anderson*** was not relevant to the present application to the extent that, in ***Anderson,*** the focus of the Court was on the requirement to inform a suspect of her right to free legal advice, as a facet of the right guaranteed by the ***Bill of Rights*** at *s.5,* and of the effect on the defendant in ***Anderson*** not being informed of such on her waiver of her right to counsel.

19. The Crown submitted that the third defendant waived his right to free legal advice. In response to the Defendant's assertion that he had waived his right to counsel because he believed that he was only entitled to counsel selected by the police and he was not content with that, Crown counsel argued that this could not amount to a breach of his right of access to counsel as he was properly advised in accordance with the law as it stands.

20. The Crown presented evidence on the *voir dire* relating to the defendant's detention. A document entitled "Prisoner's Rights' was introduced together with a custody log from the Detention Centre for the period that the third defendant was held there. Crown counsel points to what was set out in the Prisoner's Rights document and emphasized that the third defendant had signed as having read the document and had also indicated "not at the moment" in that area of the document which questioned: "Do you wish to speak with a lawyer?"

21. Crown counsel also pointed to the lack of any indication on the custody log of a request by the defendant to call an attorney, contrary to what the defendant had stated in evidence, and invited the court to consider that the request by the defendant to speak to his wife by phone was recorded, consistent with the Prisoner's Rights document and

was considered and noted on the custody record; the Crown's submission being that if a phone call to an attorney had been requested by the defendant it would have been recorded and evident on the custody record.

22. Crown counsel pointed to the defendant's own evidence that he had been interviewed by the police on other occasions and had had the benefit of his own counsel and that he had been allowed to contact counsel by telephone. Counsel submitted that this evidence showed that the defendant was aware that he would have been allowed to contact counsel if he requested, but, as reflected on both the Prisoner Rights document and on the custody record, no such request was made by the third defendant.

23. The Crown asserted that the Court in ***Anderson*** had specific regard to the fact that the defendant was a person of good character who had had no previous involvement with the criminal justice system and found that she could not be expected to understand the system and her rights. Crown counsel submitted that the third defendant's position contrasts with that of the defendant in ***Anderson*** by reason of the fact that the third defendant has nine previous convictions in this jurisdiction. The Crown pointed to the defendant's evidence that he had been previously interviewed and had been allowed to contact his attorney of choice. The Crown submitted that these were all matters to be weighed in the balance on the court's consideration of fairness on this application.

COURT'S CONCLUSIONS

24. Section 40 of the ***Evidence Law*** gives this court a wide discretion to exclude evidence otherwise admissible if such is necessary to ensure trial fairness. In the instant case the court must determine whether the defendant was given complete and correct information as to the extent of his right to legal assistance, whether he could be said to

have waived his right to legal assistance and the effect on the record of interview if the court should find that there was no effective waiver of such right.

25. That the defendant is entitled to be informed of his right to legal assistance pre-charge is not in issue. Such a right is protected by Section 5 of the ***Bill of Rights***. In the instant case, the issue is whether this defendant was so informed.

26. The evidence before the court comes from the record of interview, the defendant's own evidence on the *voir dire*, the Prisoner's Rights document and the custody record for the defendant during the period that he was detained immediately after he was arrested on the 23rd June 2018.

27. The Prisoner's Rights document records that the defendant confirmed by his initials that he had been informed of his "rights." The document's first two recitals are relevant:

"*i. You are allowed to communicate with an attorney at any time in private and free of charge for legal advice, prior to questioning by the Police;*

ii. You may also have interviews with your legal advisors arranged."

28. The document also provided the defendant with the option*: "Do you wish to speak with a lawyer*" and gives three spaces for "nominated lawyer. The defendant's response to this option was: "*Not at the moment*." On its face, this document indicates that the defendant was advised of his right to contact and speak to an attorney including his own "legal advisors".

29. The record of interview appears to refer to the defendant's indication on the Prisoner's Rights document that he did not need an attorney present at the beginning of that interview.

30. The relevant excerpt from that interview set out at paragraphs 5 & 6 above shows that the interviewing officers sought to clarify the defendant's intention with respect to contacting his attorney and then offered him the services of "a free attorney". The officers confirmed to the defendant points relating to his right to an attorney such as: "*this is an ongoing, and continued right at any point in time you wish to speak to an attorney.*" Further, in the interview and before questions concerning the actual incident for which he was arrested were put to the defendant, the officers again stated: *"So we gave you the chance to call or speak to an attorney you said you do not need an attorney present at the moment, is that correct*". The defendant confirmed that statement.

31. In his testimony on the *voir dire* the defendant stated that when the officers told him he was entitled to a free attorney that he "*took it to mean I would be given a lawyer of their choice I was not content with that.*"

32. In submissions, counsel for the defendant argued that "*there is a real danger that an interviewee could construe these words ("we have")* as restricting their access to legal advice to that provided by police lawyers or a free lawyer appointed by the police. The defendant ought to have been told that he could speak to any independent lawyer, and in particular, his lawyer.

33. The defendant's evidence when he was cross-examined is relevant to this particular aspect of this submission. The defendant related that he had been interviewed by the Police on previous occasions. He had had the benefit of counsel on some of those occasions. He had been allowed to call counsel on those occasions. He stated that he knew that he could call Mr. Collins the attorney who had previously assisted him. This is entirely inconsistent with his assertion as related in the previous paragraph in his evidence in chief on the *voir dire* that he felt that he could only have an attorney of the Police Officer's choice. It is entirely at odds with what he had signed to and had been informed of via the Prisoner's Rights document.

34. In his testimony before the court the defendant asserted that he had asked for a "couple of phone calls" that day but that he was not allowed to make those calls. As submitted by Crown Counsel the other document submitted for the court's consideration by the Crown, the custody record does not contain any entry to indicate that the defendant made any request for legal counsel to be called on his behalf on the date of the interview.

35. I bear in mind the submission by Counsel for the defendant on this point that this lack of an entry could be as a result of such request not being recorded or having been communicated to an officer who was not responsible for making such entries in the custody log. Given the detail in which the entries were made in the custody log, while these observations are not unheard of, they are to this court's mind implausible especially because it appears that all other requests were noted and actioned.

36. I note as well the seemingly off hand manner in which the defendant gave this bit of evidence and also that this denial of access to legal representation, was absent, as a basis, from the defendant's written submissions and was not mentioned prior to it (the

denial of access to legal representation) being mentioned in this way by the defendant on the *voir dire*. I take this absence as an indication that this was not part of counsel for the defendant's previous instructions as, the denial of access to the right to legal representation, if this access had been sought and denied, would have been a strong ground for making an application to exclude the record of interview.

37. I have also considered the defendant's concluding answer in cross-examination on the *voir dire*:

> "*At the present time [referring to the time at which he was being interviewed] I did not need an attorney. At the time I was in a mode of shock and wanted to try to get out of there. I was arrested and wanted to get out of there. This is why I did not mention Mr. Collins. I wanted to get out of there a quickly as possible*."

38. The clear inference from that statement is that he did not request to call Mr. Collins. He knew he could call him, and that Mr. Collins would come to assist him but, from this response, it also appears that he believed that to do so could delay the interview and he wanted to get out of the Detention Centre as quickly as possible.

39. Taking all of these factors into account, I find that the defendant was well aware that he could communicate, and call his own legal advisor, that he could consult with such legal advisor and that such legal advisor could be present during the interview if he wished him to be. He was fully advised of these rights by the Police through the Prisoner's rights document and by the officers who conducted the interview on the 23rd June 2018. I also find that he effectively waived those rights when he gave his

unequivocal indication that he wished the interview to continue without the assistance of an attorney.

40. With regard to the provisions of s.40 of the ***Evidence Law*** I do not find that this is a case in which the court should exercise its discretion to exclude the record of interview because to admit it would be unfair to the third defendant. There is no issue of lack of voluntariness and indeed there is no suggestion by the third defendant of any *mala fides* on the part of either of the officers who conducted the interview with regard to anything concerning the taking of the interview.

Dated this the 9th July 2020

Mme. Justice Marlene Carter
Acting Judge of the Grand Court