IN THE GRAND COURT OF THE CAYMAN ISLANDS

IND. NO. 70 of 2012

BETWEEN

HER MAJESTY THE QUEEN

And

EDLIN MacARTHUR MYLES

Defendant

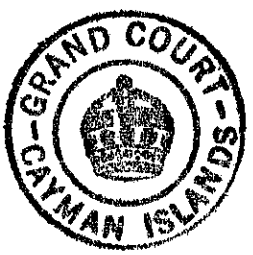
Mr. T. Ward, QC & Ms. L. Manson for the Crown

Mr. B. Tonner for the Defendant

Henderson, J.

Hearing: June 11, 2014

Judgment: June 13, 2014



RULING ON ADMISSIBILITY OF STATEMENT

1. The Crown has already adduced in evidence a very full interview of the Defendant by police investigators during which he made several admissions of an incriminating nature. Crown Counsel now tenders in evidence the content of a second lengthy interview. Defence Counsel agrees that the second statement was given voluntarily.

2. The second interview began (after the Defendant was cautioned about his right to silence) with an assertion by the Defendant that he did not wish to answer questions. As the interview progressed he refused to answer most of the questions but from time to time he did offer a substantive answer. The Crown wishes to adduce the entirety of the second interview including the many questions which the Defendant chose not to answer. The intention is that the Defendant's refusals to answer would become part of the evidentiary record.

3. The fact that the Defendant chose not to answer many of the questions is not relevant at this stage of the trial. An inference that a defendant is intentionally concealing his guilt may appear to be the only rational explanation for silence in the face of questioning. The law does not permit the jury to draw an inference adverse to a criminal defendant simply from his refusal to answer questions. There is no generalized right to draw an adverse inference from silence in the face of questioning. If this lengthy interview is placed in evidence in its entirety there is a danger the jury will draw an improper inference. They will be tempted to reason that the Defendant's refusal to explain or justify the evidence the police drew to his attention is proof of his consciousness of guilt. A man who believes in his own innocence would have willingly told the investigators what they wanted to know.

4. The consequence is that there is a real risk of prejudice and an unfair trial. This is not a case where I must weigh the risk of prejudice against the probative value of the evidence for the refusal to answer questions has no probative value unless and until the trial takes a certain course. If the Defendant chooses to rely upon a fact (whether by giving evidence or

otherwise) then his refusal to answer a question on the subject earlier may become admissible. The law is set out in section 148 of the *Police Law (2010 Revision)*, the material parts of which are as follows:

> *148 (1) Where, in any proceedings against a person for an offence, evidence is given that the accused –*
>
> > *(a) at any time before he was charged with the offence, on being questioned by a police officer trying to discover whether or by whom the offence had been committed, failed to mention any fact relied on in his defence in those proceedings; or*
> >
> > *(b) on being charged with the offence or officially informed that he might be prosecuted for it, failed to mention any such fact; or*
> >
> > *(c) at any time after being charged with the offence, on being questioned under the Terrorism Law (2009 Revision), failed to mention any such fact,*
>
> *being a fact which in the circumstances existing at the time the accused could reasonably have been expected to mention when so questioned, charged or informed, as the case may be, subsection (2) shall apply.*
>
> *(2) A –*
>
> > *(a) court in determining whether there is a case to answer; or*
> >
> > *(b) court or jury, in determining whether the accused is guilty of the offence charged,*
>
> *may draw such inferences from the failure as appear proper.*
>
> ...
>
> *(4) Subject to any directions by the court, evidence tending to establish the failure may be given before or after evidence tending to establish the fact which the accused is alleged to have failed to mention.*
>
> ...
>
> *(6) This section does not -*
>
> > *(a) prejudice the admissibility in evidence of the silence or other reaction of the accused in the face of anything said in his presence*

relating to the conduct in respect of which he is charged, in so far as evidence thereof would be admissible apart from this section; or

(b) preclude the drawing of any inference from any such silence or other reaction of the accused which could properly be drawn apart from this section. [underlining added]

5. The common law permits evidence of an accused person's silence to be entered in evidence in certain specific circumstances which have no application here; the common law rule is preserved in effect by s. 148(6) quoted above. If the Defendant's refusal to answer one or more specific questions does become admissible under the provision I have quoted, the Crown will be at liberty to challenge him in cross-examination on his earlier refusal to answer. If necessary, the Crown will be permitted to lead evidence of the refusal in rebuttal.

6. The Defendant did give two answers to questions which are relevant and admissible. These two questions and answers have been incorporated into a set of admissions of fact and may be read to the jury.

7. The balance of the second interview is not relevant and can be excluded on that ground alone. In addition, I exercise my discretion under sections 40 of the *Evidence Law (2011 Revision)* and 152(5) of the *Police Law (2010 Revision)* to exclude the second statement at this stage on the ground that its admission would be unfair.

Henderson, J.

Henderson, J.

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