

ROYAL COURT  
(Samedi Division)

104

8th June, 1995

Before: The Deputy Bailiff, sitting alone.

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The Attorney General

- v -

Edward Robert Lundy

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Trial before the Inferior Number, following not guilty pleas, entered on 24th February, 1995, to:

2 counts of possession of a controlled drug with intent to supply it to another, contrary to Article 6(2) of the Misuse of Drugs (Jersey) Law, 1978:

Count 1 : Lysergide.  
Count 2 : Amphetamine Sulphate; and

2 counts of possession of a controlled drug, contrary to Article 6(1) of the said Law:

Count 3 : Lysergide.  
Count 4 : Amphetamine Sulphate.

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Advocate C.J. Scholefield for the accused.  
A.J.N. Dessain, Esq., Crown Advocate.

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JUDGMENT

(on preliminary point of admissibility  
of Evidence submitted by the Crown).

**THE DEPUTY BAILIFF:** In the absence of the two Jurats there has been put to me a question on the question of the admissibility of evidence under the hearsay rule.

5           The facts are already well established. It is not necessary for me to rehearse them here. We are not yet at a stage when the learned Jurats will retire to consider their verdict. At that stage I will summarise the facts in more detail.

We have this scenario: on the prosecution evidence that we have heard to date, the accused, Lundy, was observed approaching a disused toilet where drugs had been found concealed earlier. The location had been under police observation for some time. He was challenged with the words "Lundy, Police, stay where you are". The accused ran at two plain-clothes police officers and collided heavily with D.C. de la Haye, who struck him a glancing blow on the shoulders with his truncheon. There was a pursuit. Other plain-clothes police officers attempted to detain Lundy. D.C. Nicol adopted a crouching position with his back to the traffic at the exit of the archway leading into Charing Cross. Lundy, running towards him, collided with D.C. Nicol, who fell into the road. Lundy stumbled but continued running towards Broad Street.

D.C. Thomas says that he was continuing in pursuit and within 6 ft. of Lundy when he recognised a man called Brendan Feagan, who, having seen Lundy run out of the alleyway, began to run alongside him. D.C. Thomas said that Feagan was originally standing outside the premises known as Charing Cross Wine Store. D.C. Thomas says that he heard Feagan say these words to Lundy "Have you got the acid. Give me the acid". The officer did not hear any reply from Lundy. D.C. Thomas is an experienced Drug Squad officer and was well aware that the term "acid" is the street name for the drug L.S.D. After a complicated chase Lundy was arrested. A packet of L.S.D. tablets was later found to be missing from the toilet. No such packet, or any drugs were found on Lundy, but a similar packet was later found in the road where Lundy had clashed with D.C. Nicol.

Feagan is not called as a witness and no one but D.C. Thomas heard the words allegedly spoken by Feagan. Feagan astonishingly was not seen again after the incident, but made good his escape and is now apparently in the Irish Republic.

The question which I have to ask myself is whether the statement made by Feagan is hearsay. The whole concept of the meaning of hearsay is not without difficulty. I can define hearsay to mean evidence of an oral or written statement made by a person other than the witness who has testified to prove the truth of the matter stated. It is therefore important to bear in mind that not all evidence of what a third party says is hearsay. In Subramaniam -v- the Public Prosecutor (1956) 1 WLR 965-970; 100 S.J. 566, the Privy Council states these words which are as apposite today as they were when they were delivered:

*"Evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the*

*evidence, not the truth of the statement, but the fact that it was made."*

5 However, Advocate Dessain has argued very strongly that there is no hearsay in this matter at all because, he says, the words allegedly spoken by Feagan were spoken in Lundy's presence. As is stated in the 7th Edition of Croft on "Evidence":

10 *"Statements made in the presence of a party are admissible as an introduction to his or her reaction to them which may or may not prove to be relevant. The question whether an adverse inference should be drawn from that reaction has to be determined by a jury where there is one."*

15 We have examined many helpful and leading English cases during the course of this application but I must say that I do not feel that the leading case of R. -v- Kearley (1992) 2 All ER 345; [1992] 2 A.C. 229 (H.L.(E.)) is in point. That case affirmed that the hearsay rule does extend to implied assertions. The difficulty that I face in examining R. -v- Kearley is that the words spoken on the telephone were not spoken in the presence or hearing of the defendant. That is obviously so because, in that case, he was in custody at the time. Although, of course, they were spoken by a person who was not called as a witness.

25 Advocate Scholefield said that in the circumstances of the chase that I have briefly outlined, to say that Feagan was in the presence of Lundy is stretching the meaning of words to their breaking point. With great respect to Advocate Scholefield's attractive argument, I must disagree. I have no doubt that the words were spoken in the presence or hearing of the defendant, and I can see no other logical conclusion.

30 As was said by Lord Atkinson in R. -v- Christie (1914) AC 545 at 554:

35 *"The rule of law undoubtedly is that a statement made in the presence of an accused person, even upon an occasion which should be expected reasonably to call for some explanation or denial from him, is not evidence against him of the facts stated save so far as he accepts the statement so as to make it in effect his own. If he accepts the statement in part only, then to that extent alone does it become his statement. He may accept the statement by word or conduct, action or demeanour, and it is the function of the jury which tries the case to determine whether his words, action, conduct or demeanour at the time when the statement was made amounts to an acceptance of it in whole or in part. It by no means follows, I think, that a mere denial by the accused of the facts mentioned in the statement necessarily renders the statement inadmissible, because he may deny his statement*

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*in such a manner and under such circumstances as may lead a jury to disbelieve him, and constitute evidence from which an acknowledgement can be inferred by them."*

5 But in any event, is the statement part of the *res gestae*?  
As I understand it, the *res gestae* are those facts which form part  
of the same transaction as the facts in issue. Acts and  
declarations which constitute or accompany or explain the fact in  
10 issue whether said or done by the parties themselves or by third  
parties are admissible as forming part of the *res gestae*. Of  
course, if not absolutely contemporaneous with the action or event  
they must be so closely associated with it in time, place and  
circumstance that they are part of the thing done.

15 Let me call to mind the scenario. I do not need to repeat  
it. Feagan had been seen earlier in the area of the toilets  
acting suspiciously. Lundy was joined in the chase by Feagan who  
had apparently been standing by the glass panelled door of the  
wine shop and very close to the Charing Cross entrance where Lundy  
20 collided with D.C. Nicol.

Feagan is a man who, on the facts that we have heard to date,  
might be considered to be a confederate of Lundy. The words were  
heard by D.C. Thomas but by no one else. There was apparently no  
25 reply from Lundy, but if he did not hear the words in the heat of  
the flight, he could not have replied to them. If he did hear  
them then he must give some explanation for them.

30 In R. -v- Andrews (1987) 1 A.C. 282 (H.L.(E.)) at 300 Lord  
Ackner said this:

*"My Lords, may I therefore summarise the position which  
confronts the trial judge when faced in a criminal case  
with an application under the *res gestae* doctrine to admit  
evidence of statements, with a view to establishing the  
35 truth of some fact thus narrated, such evidence being  
truly categorised as "hearsay evidence?"*

40 *1. The primary question which the judge must ask himself  
is - can the possibility of concoction or distortion be  
disregarded?*

45 *2. To answer that question the judge must first consider  
the circumstances in which the particular statement was  
made, in order to satisfy himself that the event was so  
unusual or startling or dramatic as to dominate the  
thoughts of the victim, so that his utterance was an  
instinctive reaction to that event, thus giving no real  
opportunity for reasoned reflection. In such a situation  
50 the judge would be entitled to conclude that the  
involvement or the pressure of the event would exclude the  
possibility of concoction or distortion, providing that*

the statement was made in conditions of approximate but not exact contemporaneity.

5 3. In order for the statement to be sufficiently "spontaneous" it must be so closely associated with the event which has excited the statement, that it can be fairly stated that the mind of the declarant was still dominated by the event. Thus the judge must be satisfied that the event, which provided the trigger mechanism for the statement, was still operative. The fact that the statement was made in answer to a question is but one factor to consider under this heading.

15 4. Quite apart from the time factor, there may be special features in the case, which relate to the possibility of concoction or distortion. In the instant appeal the defence relied upon evidence to support the contention that the deceased had a motive of his own to fabricate or concoct, namely, a malice which resided in him against O'Neill and the appellant, because so he believed, O'Neill had attacked and damaged his house and was accompanied by the appellant, who ran away on a previous occasion. The judge must be satisfied that the circumstances were such that having regard to the special feature of malice, there was no possibility of any concoction or distortion to the advantage of the maker or the disadvantage of the accused.

25 5. As to the possibility of error in the facts narrated in the statement, if only the ordinary fallibility of human recollection is relied upon, this goes to the weight to be attached to and not to the admissibility of the statement and is therefore a matter for the jury. However, here again there may be special features that may give rise to the possibility of error."

35 I have no doubt that the statement, albeit nine words long, was part of the *res gestae*. However, it seems to me that although I have ruled that the statement is admissible, it will be for the learned Jurats to decide upon the accuracy of what was said and to be sure that D.C. Thomas was not mistaken in what he said he heard. The Jurats will also have to be satisfied, if it is suggested to them - and I have no indication of that line of attack on the evidence being made at the moment - that D.C. Thomas has not invented the words in an attempt to ensure the conviction of Lundy.

45 Mr. Scholefield has said to us that it is inherently unlikely that Feagan would have acted as he did and in the heat of a chase the danger of distortion is huge. In the absence of Feagan from the Island the whole weight of the words will be held in the balance, but, in my view, the learned Jurats are well able to weigh that balance judicially.

There is one final point. Mr. Scholefield relied as a fail-safe point on the case of R. -v- Sang (1979) 3 WLR 263. This case appears to say, in the words of Lord Diplock at p.269:

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*"So I would hold that there has now developed a general rule of practice whereby in a trial by jury the judge has a discretion to exclude evidence which, though technically admissible, would probably have a prejudicial influence on the minds of the jury, which would be out of proportion to its true evidential value."*

That may well be so but in a just society, as Lord Scarman said elsewhere in the judgment *"the conviction of the guilty is as much a public interest as is the acquittal of the innocent"*.

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I can see no reason why the statement allegedly made by Feagan should not be weighed in the balance with all the other evidence. It is, in my view, legally admissible and I can see no great prejudice which would allow me to exercise a judicial discretion not to allow it in. But I am perfectly happy, in fairness to the accused, to discuss with counsel the direction that I should give to the learned Jurats if counsel wish me to take that course.

[Discussion with Counsel]

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The learned Jurats have been handed the unedited version of the statement made by the Police Officer. I have to say merely this to the learned Jurats. We have had yesterday afternoon a very detailed legal argument and I have allowed this statement in as part of the *res gestae*. That is an exception to the hearsay rule. But there is another point which counsel have asked me to put to the learned Jurats and I put it now in this form. It is part of a judgment delivered by Lord Atkinson in the case of R. -v- Christie in 1914 and what was said there was this:

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*"The rule of law undoubtedly is that a statement made in the presence of an accused person, even upon an occasion which should be expected reasonably to call for some explanation or denial from him, is not evidence against him of the facts stated save so far as he accepts the statement so as to make it in effect his own. If he accepts the statement in part only, then to that extent alone does it become his statement. He may accept the statement by word or conduct, action or demeanour, and it is the function of the jury which tries the case to determine whether his words, action, conduct or demeanour at the time when the statement was made amounts to an acceptance of it in whole or in part. It by no means follows, I think, that a mere denial by the accused of the facts mentioned in the statement necessarily renders the*

*statement inadmissible, because he may deny his statement in such a manner and under such circumstances as may lead a jury to disbelieve him, and constitute evidence from which an acknowledgement can be inferred by them."*

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I would ask the learned Jurats very carefully to weigh in the balance a statement made by someone who is not called as a witness and the evidence which is given by a Police Officer.

Authorities

Subramaniam -v- Public Prosecutor (1956) 1 WLR 965-970; 100 S.J. 566.

R. -v- Kearley (1992) 2 All ER 345; [1992] 2 A.C. 229 (H.L.(E.)).

R. -v- Christie (1914) A.C. 545 (P.C.).

R. -v- Andrews (1987) 1 A.C. 282 (H.L.(E.)).

R. -v- Sang (1979) 3 WLR 263.

Ratten -v- The Queen [1972] A.C. 378 (P.C.).

Cross on Evidence (7th Ed'n): pp. 591-596.

Phipson on Evidence (14th Ed'n): pp. 705-720.