

ROYAL COURT
(Samedi Division)

242A.

18th December, 1996

Before: F.C. Hamon, Esq., Deputy Bailiff, and
Jurats Gruchy and de Veulle.

The Attorney General

- v -

Francis Wilfred Joseph Dowse,
Philip Heys.

FRANCIS WILFRED JOSEPH DOWSE.

1 count of being knowingly concerned in the fraudulent evasion of the prohibition on the importation of a controlled drug, contrary to Article 77(b) of the Customs and Excise (General Provisions) (Jersey) Law, 1972:

Count 1 : diamorphine.

The Crown was given leave to add the following supplementary count which to the indictment on 16th December, 1996:

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

Count 3 : diamorphine.

PHILIP HEYS.

1 count of being knowingly concerned in the fraudulent evasion of the prohibition on the importation of a controlled drug, contrary to Article 77(b) of the Customs and Excise (General Provisions) (Jersey) Law, 1972:

Count 2 : diamorphine.

1 count of possession of a controlled drug contrary to Article 6(1) of the Misuse of Drugs (Jersey) Law, 1978:

Count 4 : cannabis resin.

Challenge by counsel for Dowse to the admissibility of admissions made by him at the time of his arrest. Dowse denied that he had been cautioned, but that even if he had been, he had failed to hear the caution. He alleged that the police officer was in breach of Code C. After his arrest Dowse was taken to his flat at Seale Street where a search was carried out. During this time, he made admissions to Detective Inspector O'Brien. These were challenged

because the Inspector had not contemporaneously made a note of the admissions and signed his pocket book.

The Solicitor General.
Advocate C.J. Scholefield for F.W.J. Dowse.
Advocate H. Tibbo for P. Heys.

JUDGMENT

5 THE DEPUTY BAILIFF: In this second *voir dire* Advocate Scholefield attacks the caution given to the accused, Dowse, and the way that remarks purportedly made by him in his flat, where he was taken after his arrest, were recorded.

The States of Jersey Police Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers says at paragraph 12(13):

10 "A written record shall be made of any comments made by a suspected person including unsolicited comments which are outside the context of an interview, but which might be relevant to the offence. Any such record must be timed and signed by the maker. Where practicable the person shall be given the opportunity to read that record, to sign it as correct, or to indicate the respects in which he considers it inaccurate. Any refusal to sign shall be recorded".

20 That is precisely the same wording as Code C 11.13 which is in use in the United Kingdom. Of that Code, Lord Lane CJ said in the case of R. -v- Canale (8th November, 1989) TLR:

25 "If, which we find it hard to believe, police officers still do not appreciate the importance of the Police and Criminal Evidence Act and the accompanying Code then it is time that they did. The Codes of Practice and in particular the Codes relating to interviews and questioning of suspects are particularly important".

30 I have to say in the context that, of course, the Code of Conduct in Jersey has no statutory backing.

35 The protection given by this voluntary Code - and that is a somewhat trite euphemism in my view to explain that there is no statutory authority setting up the Code in Jersey - is well stated in the case of de la Haye -v- AG (24th April, 1996) Jersey Unreported CofA. That was a case of rape and the Court of Appeal performed a similar comparison over the English statutory Code relating to identification parades issued under the Police and Criminal Evidence Act 1984 which of course had direct comparison

with the Jersey Police Manuel of Guidance. What the Court of Appeal said in de la Haye, at p.9 is this:

5 *"One difference between R. -v- Quinn and this case is that in England Code D has statutory force, so that breaches of it are breaches of the law, whereas here the rules contained in the Manual of Guidance are rules of guidance only. We do not, however, attach any weight to this difference. The rules are framed for the fundamentally*
10 *important purpose of achieving fairness in the conduct of identification parades, and breaches of them ought not to be treated by the Courts in any way different from the way in which breaches of the Code are treated in England".*

15 Miss Nicolle has pointed out that this Code in Jersey is not even approved by the Defence Committee, but was instigated by the officers themselves. But as Assistant Chief Officer Paul Marks told us any officer who by deliberate avoidance of the guidelines, gross neglect or repetition or failure after advice had been given
20 about compliance with Code C continues not to comply may be liable to disciplinary action.

25 Miss Nicolle says that while she, of course, is well aware of the Court of Appeal's judgment, we should not really extend the matter but I am bound, as are all Inferior Courts, by the Court of Appeal, which appears to me to approve the Code in its entirety; it is splitting hairs to say that they were talking of Code D and not Code C.

30 There were three senior police officers amongst others at Dowse's flat on the evening in question. It is important to say - and I shall repeat this during the course of this judgment - that there is no reflection on the integrity of the officers. I say that because the provisions of the Code of which paragraph 12(13)
35 forms a part were essentially drawn up to redress what had become known in England as "verballing" and these provisions are anti-verballing provisions. But there is an important contra issue here. I do not take the view on what I have heard that there is any absence of good faith by the three police officers involved.
40 It cannot be the duty of the Court to render a statement inadmissible as a means of showing the Court's displeasure for experienced policemen having failed, inadvertently perhaps, to observe their own Code of Practice. There must be a significant and real breach which makes that breach oppressive. That is a
45 concept which will turn on the particular facts of this case.

50 I have to say, having studied the authorities that have been put before me, that it is clear that bad faith will not necessarily lead to the evidence being excluded but the corollary of that of course is that good faith will not excuse serious breaches of the Code.

In Clarkin -v- AG (1991) JLR 232 CofA, a case that was cited with approval in the case of Goodman -v- AG (27th September, 1995) Jersey Unreported CofA. The Court of Appeal at p.242 said this:

5 *"The conflicting interests of the State in securing
evidence of the commission of crime and of the individual
being protected from an unauthorized invasion of his
rights of privacy were addressed in a passage in the
10 opinion of Lord Cooper in the Scottish case of Lawrie and
Muir which was cited by Lord Hodson in King -v- R and
which seems to us to illuminate the problem in words which
we are happy to adopt:*

15 *"From the standpoint of principle it seems to me that
the law must strive to reconcile two highly important
interests which are liable to come into conflict (a)
the interest of the citizen to be protected from
illegal or irregular invasions of his liberties by the
20 authorities, and (b) the interest of the State to
secure that evidence bearing upon the commission of
crime and necessary to enable justice to be done shall
not be withheld from Courts of law on any merely formal
or technical ground. Neither of these objects can be
insisted upon to the uttermost. The protection of the
25 citizen is primarily protection for the innocent
citizen against unwarranted, wrongful and perhaps high-
handed interference, and the common sanction is an
action of damages. The protection is not intended as a
protection for the guilty citizen against the efforts
30 of the public prosecutor to vindicate the law. On the
other hand, the interest of the State cannot be
magnified to the point of causing all the safeguards
for the protection of the citizen to vanish, and of
offering a positive inducement to the authorities to
35 proceed by irregular methods".*

They (that is the Court in Clarkin) then criticised the Royal Court for its decision as follows:

40 *It follows that the Royal Court was wrong, in our
judgment, to regard its discretion to exclude the evidence
of possession as being exercisable only if it were
satisfied that the prejudicial effect of that evidence
45 outweighed its probative value. The correct principle is
that a discretion to exclude evidence otherwise admissible
should be exercised when, having regard to all the
circumstances (including the circumstances in which the
evidence was obtained), the trial court is satisfied that
the use of that evidence would undermine the justice of
50 the trial. The power to exclude evidence on that basis is
a necessary incident to the over-riding duty of the trial*

court, which is to ensure that the accused has a fair trial".

5 As it is I intend to move with some caution before making a decision. Significant and substantial breaches of the Code mean that the standard of fairness that the public expects from a criminal trial have not been met. As was said in R -v- Walsh (1990) 91 Cr.App.R. 161 the task of the court is not merely to consider whether there would be an adverse effect on the fairness of the proceedings but whether there has been such an adverse effect that justice requires the evidence to be excluded.

10 Firstly, the question of the caution. Dowse claims to have a serious hearing impairment because of a perforated ear-drum caused in a parachute jump in 1991. Advocate Scholefield at one point appeared to argue that when he was first arrested in Don Road by plain clothes drug squad officers, no caution was administered to him at all, nor was a caution administered to him in the unmarked police car, a few moments later. But then the argument may be that if a caution were administered he did not hear it. We accept that medically he may have a hearing impairment, but it passes belief that a man who in one witness box before me heard without difficulty every question put to him at a fair distance by his counsel and also by the Solicitor General at a fair distance when in the other witness box - could not hear the caution administered from one or two feet away from him.

15 The caution was given by DC Megaw initially and Dowse was reminded of it in the car by DS Coles. Both these persons are experienced drugs squad personnel who had over that day been involved both in Jersey and on the mainland in a sophisticated under-cover exercise. It is inconceivable to the Court that when they say they administered the customary caution not once but twice that we need not believe them.

20 Mr. Scholefield says that after caution PS Molloy said "Do you understand?" and Dowse said "I understand" DC Beghin did not hear those words because they are not in his notebook. There is nothing of significance in that - in my view the caution was properly administered.

25 There is a conflict about what happened in the flat. There is a very real discrepancy. Advocate Scholefield expressly made no imputation about the integrity of the police officers. He said that there had been an honest mishearing in what he described as the "party atmosphere" of the search where, according to Dowse, police officers helped themselves to refreshments from his refrigerator. That was of course emphatically denied by those police officers present. Two officers at the time were keeping running notebooks during the search. DS Coles and DC Beghin. Later DI O'Brien arrived at the flat. He was informally dressed and knew Dowse as a former next-door neighbour of his. He was

there not only as the head of the enquiry, but also to encourage a calming atmosphere as he did in many drug searches which could well have a deeply traumatic effect on those whose effects were being examined.

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DC Beghin's notebook which we looked at says this: "Dowse shown drug warrant and it was explained to him. Dowse stated that there was nothing in the flat but realised we had to search it. On arrival at premises searched Dowse's clothing. DS Coles asked him how he had brought the gear in. He stated "in my pockets" indicating his raincoat which I then bagged and sealed. DS Coles then asked him how much was in the packages to which he replied "I don't know. I don't even know what's in them. Well, I know it's drugs but not what type". During general conversation with DS Coles, Dowse asked if he was followed from Gatwick and on the train and whether, if he had changed his flight to come back at lunchtime, we would have been aware of it. DS Coles informed him that we would. I asked him about the contents of his flat and what he owned. He stated that everything in the flat was bought and paid for except for the leather suite for which he owed £800. He was asked how much the suite cost and stated £1,800. He further stated that he had not paid the remaining £800 as the suite was not the same colour. DI O'Brien and Mike Robinson entered the premises; DI O'Brien spoke to Dowse who again stated he knew that there was drugs in the package but he didn't know what. He stated he was to have been paid £2,000 for bringing the package into the island. He added he had taken possession of the drugs that afternoon at Gatwick which he then changed to Victoria Station".

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When you look at the statements and, as I recall, DC Beghin's statements were made some three months later because of pressure of work, they are not quite the same. DS Coles, for instance, is a little out of sequence with those remarks. Again, DI O'Brien said much the same in the witness box with slight variations but what troubles us is that he told us that during the whole of the time that he was in the flat, his notebook was in his pocket; he did not take it out; he did not use it and he signed DS Coles' notebook.

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I am not going to read the statements of the various police officers, suffice it to say that there is a slight variation in sequence and in certain words which have been used.

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What is important is that Dowse stated that he had said something quite different. When DI O'Brien arrived at the flat and shook his hand he made a comment "this is a bloody mess" or "it's a bloody mess" and then said "any idea what's in the package, Bill? - that is how he referred to DI O'Brien who said: "There are two packages; how much do you reckon to get paid for this; it's normally £1,000 per package". And then Dowse said

"I've actually been paid £2,000 for taking packages to England before".

5 He then says that DI O'Brien went with the senior officers into the bedroom to confer and he does not know what happened there. Of course we recalled DI O'Brien and he emphatically denied that Dowse's version was the correct one.

10 We have looked essentially at two English cases R -v- Keenan (1990) 2 QB 54 and R -v- Canale, but those cases are really only helpful in their context. Keenan, for example, was virtually compelled to go into the witness box to refute statements that had been made, but in this case Dowse went voluntarily into the witness box under no pressure having already put his name on the *billet* and having been sworn in at the commencement of the trial.

20 I shall say it for the third time there is no questioning the good faith of the officers and no allegation of misconduct. Mr. Scholefield in fact said that such a suggestion was essentially disavowed. However, I am left with the worrying consideration that it would have been so simple for this essentially important matter to have been recorded and put to Dowse. There were three senior drug squad officers present. In my view the Code has been breached to the extent that what was said by Dowse should be excluded from the trial and I so rule.

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Authorities

Police and Criminal Evidence Act 1984.

de la Haye -v- AG (24th April, 1996) Jersey Unreported CofA.

Clarkin -v- AG (1991) JLR 232 CofA.

R-v-Canale (8th November, 1989) T.L.R.

Goodman-v-A.G. (27th September, 1995) Jersey Unreported CofA.

R.-v-Walsh (1990) 91 Cr. App. R. 161.