10/6/2005

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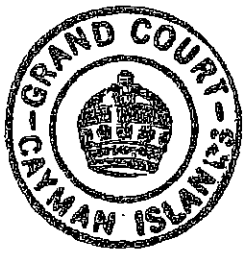
IN THE GRAND COURT OF THE CAYMAN ISLANDS
HOLDEN IN GEORGE TOWN, GRAND CAYMAN

IND. 48 OF 2004

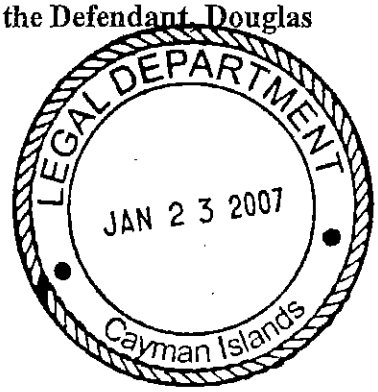
REGINA

V.

EZEKIEL CARTER
OSBOURNE DOUGLAS



Appearances: **Mr. Andre Mon Desir for the Crown**
Mr. James Austin-Smith of Walkers for the Defendant, Carter
Mr. Nicholas Dixey of Quin & Hampson for the Defendant, Douglas



Before: **Hon. Justice Henderson**

Heard: **June 1, 2005**

RULING

Crown counsel has disclosed that on the morning of the commencement of the trial he conducted a pre-trial interview with Glen Hydes, the most significant of the Crown witnesses.

Defence counsel object. They say that this was manifestly wrong and that Mr. Mon Desir, acting for the Crown, must withdraw from the case immediately and make himself available as a defence witness. They demand that he provide them with a witness statement.

Mr. Mon Desir has disclosed that Mr. Hydes reviewed his witness statement and then, in the course of answering questions during the pre-trial interview, contradicted certain aspects of that statement.

The argument advanced by Mr. Austin-Smith, supported by Mr. Dixey, turns on the wording of section 111 of the Criminal Procedure Code (1995 Revision), and the Code of Conduct for the Bar of England and Wales.

Section 111 reads as follows:

> "Subject to this Code and to any other law for the time being in force in the islands, the practice of the Grand Court in the exercise of its criminal jurisdiction and the mode of conduct and procedure at the trial of any person upon indictment shall be assimilated so far as circumstances admit to the practice of courts of equivalent jurisdiction in England."

The Code of Conduct for the Bar of England and Wales, in its present form, contains this provision in section 705:

> "A barrister must not:
>
> (a) rehearse, practice or coach a witness in relation to his evidence or the way in which he should give it;
>
> (b) place a witness under any pressure to provide other than a truthful account of his evidence."

Section 707 provides this seemingly important qualification:

> "A barrister in independent practice who attends court in order to conduct a case in circumstances where no professional client or representative of a professional client is present may, if necessary, interview witnesses and take proofs of evidence."

The Code does not stand alone. The Bar Council has issued a number of general standards in writing meant to serve as an authoritative canon of interpretation for the Code.

I propose, because of the importance of this issue for the Cayman Islands, to quote at some length from those written standards:

> 6.1.2. "There is no longer any rule which prevents a barrister from having contact with any witness.
>
> 6.1.3. In particular, there is no longer any rule in any case (including contested cases in the Crown court) which prevents a barrister from having contact with a witness whom he may expect to call and examine in-chief with a view to introducing himself to the witness, explaining the court's procedure (and in particular the procedure for giving evidence) and answering any questions on procedure which the witness may have.
>
> 6.2.1. Different considerations apply in relation to contact with witnesses for the purpose of interviewing them or discussing with them (either individually or together) the substance of their evidence or the evidence of other witnesses.
>
> 6.2.2. Although there is no longer any rule which prevents a barrister from having contact with witnesses for such purposes, a barrister should exercise his discretion and consider very carefully whether and to what extent such contact is appropriate bearing in mind in particular that it is not the barrister's function (but that of his professional client) to investigate and collect evidence.
>
> ...
>
> 6.2.4. A barrister should be alert to the risks that any discussion of the substance of a case with a witness may lead to suspicions of coaching and thus tend to diminish the value of the witness' evidence in the eyes of the Court or may place the barrister in a position of professional embarrassment, for example, if he thereby becomes himself a witness in the case. These dangers are most likely to occur if such discussion takes place:
>
> > (a) before the barrister has been supplied with a proof of the witness' evidence; or
> >
> > (b) in the absence of the barrister's professional client or his representative. A barrister should also be alert to the fact that even in the absence of any wish or intention to do so authority figures do subconsciously influence lay witnesses.

Discussion of the substance of the case may unwittingly contaminate the witness' evidence.

6.2.5. There is particular danger where such discussions

(a) take place in the presence of more than one witness of fact; or

(b) involve the disclosure to one witness of fact of the factual evidence of another witness.

6.2.6. While there is no rule that any longer prevents a barrister from taking a witness statement in civil cases (for cases in the Crown court see below), there is a distinction between the settling of a witness statement and taking a witness statement. Save in exceptional circumstances it is not appropriate for a barrister who has taken witness statements, as opposed to settling witness statements prepared by others, to act as counsel in that case because it risks undermining the independence of the barrister as an advocate.

6.2.7. There is no rule which prevents a barrister from exchanging common courtesies with the other side's witnesses. However, a barrister should not discuss the substance of the case or any evidence with the other side's witnesses except in rare and exceptional circumstances and then only with the prior knowledge of his opponent.

6.3.1. Contested criminal cases in the Crown court present peculiar difficulties and may expose both barristers and witnesses to special pressures. As a general principle, therefore, with the exception of the lay client, character and expert witnesses, it is wholly inappropriate for a barrister in such a case to interview any potential witness. Interviewing includes discussing with any such witness the substance of his evidence or the evidence of other such witnesses.

6.3.2. As a general principle, prosecuting counsel should not confer with an investigator witness unless he has also discharged some supervisory responsibility in the investigation and should not confer with investigators or receive factual instructions directly from them on matters about which there is or may be a dispute.

6.3.3. There may be extraordinary circumstances in which a departure from the general principles set out in paragraphs 6.3.1 and 6.3.2 is unavoidable. An example of such circumstance is afforded by the decision in *Fergus [1994]* 98 C.A.R. 313.

6.3.4. Where any barrister has interviewed any potential witness

> or any such witness has been interviewed by another barrister, that fact shall be disclosed to all other parties in the case before the witness is called. A written record must also be made of the substance of the interview and the reason for it."

That, to my understanding, describes the current rule of ethics and procedure in England pertaining to barristers interviewing witnesses.

Mr. Austin-Smith says the English position, or at least that part of it which applies to criminal trials in the Grand Court, has been adopted here through the effect of section 111 of the Criminal Procedure Code. In addition, Mr. Austin-Smith argues that the rule prohibiting (for the most part) interviews between Crown counsel and a witness is a rule of criminal practice and procedure as much as a rule of professional ethics.

In this regard he cites two decisions from England. In *R. v. Momodou; R. v. Limani [2005]* EWCA Crim 177, the Court of Appeal addressed a related but not identical question at considerable length. The evidence showed that there had been extensive coaching of Crown witnesses prior to trial. Under the heading "Witness Training (Coaching)" (at paragraph 61) the Court of Appeal states very clearly that coaching is prohibited. The judgment does not address squarely the question of witness interviews, but the tenor of it suggests that the Court expects Crown counsel to conduct themselves in accordance with the Code of Conduct and the Bar Council standards.

In *R. v. Skinner [1994]* 99 C.A.R. 212, the Court of Appeal addressed another related question. In Skinner's case, the investigating officers had discussed the case, the sequence of events, and, I take

it, some of the evidence they would be giving, between themselves prior to trial. The practice was deprecated.

I think it clear that if section 705(a) of the United Kingdom Code of Conduct has application in these islands, Mr. Mon Desir stands in breach of it.

Before proceeding, it is necessary to state with precision the relatively narrow point at issue here. Crown counsel has conducted what is known as a "pre-trial interview". That process follows a well understood pattern. It begins with the witness being handed his statement and asked to read it.

It continues with the prosecuting barrister, or Crown counsel, describing to the witness, in general terms and without reference to the specific case, certain court processes such as: the oath, the alternative of an affirmation, the sequence of direct examination, cross-examination and re-examination, and the need to stand in the witness box, to speak up clearly and face the jury. This is part of what is called "familiarisation" and is permissible in England within certain limitations.

The pre-trial interview then continues with Crown counsel asking non-leading, open-ended questions of the sort he will ask in direct examination while the witness gives his answers. In effect, there is a rehearsal of the direct examination. If the witness cannot recall some matter referred to in his statement, his attention may be directed to the appropriate passage with a request that he read it again for the purpose of refreshing his memory. Leading questions and cross-examination are not permissible. That is a form of coaching, which is forbidden. Prosecuting counsel may not suggest answers or indicate surprise or disapproval at the answers he does receive.

Two or more witnesses may never be interviewed together. The statement of one witness may never be shown to another. No mention should be made of the evidence of any other witness. Contradictions between witnesses should not be revealed.

Crown counsel must note the fact of the interview on the file and make a note of anything said by the witness which expands upon or contradicts his witness statement. Prompt disclosure must be made to the defendant of the fact of the interview and of the evidence of the witness which differs from that contained in his statement.

What I have just described is the standard pre-trial interview between a Crown witness and the prosecuting barrister. It has taken place on a daily basis for many years in Jamaica, Trinidad and Canada.

In the Cayman Islands, a majority of the Crown counsel are from other Caribbean jurisdictions, principally Jamaica. Those counsel conduct pre-trial interviews as a matter of course. Some Crown counsel here have been trained in the United Kingdom. I am told they do not conduct such interviews here but adhere to the position mandated by the United Kingdom Code of Conduct.

The Cayman Islands has no Code of Conduct with a provision similar to section 705(a) of the Code of Conduct of the Bar of England and Wales. This is because no distinction is made here between

barristers and solicitors. We have a fused bar, as is the case in Jamaica, Trinidad and Canada. A qualified person is called to the bar and admitted as a solicitor simultaneously.

A barrister here has no professional client. It will fall to the defence attorney, who is also a solicitor, to interview witnesses, prepare witness statements and adduce the evidence at trial. There is no prohibition on pre-trial interviews because such a prohibition in these circumstances would be artificial and unworkable. In a criminal case, the same defence attorney will interview defence witnesses, take their statements and adduce the evidence in the courtroom.

In jurisdictions with fused bars, it appears to be widely accepted that Crown counsel, like defence counsel, may interview a witness prior to trial. He is permitted to take a witness statement or a further statement if that is desirable.

I should add something about the dangers and countervailing advantages of pre-trial interviews.

The obvious dangers are those identified in the guidance standards and the English authorities. There is a danger that a rehearsal of the direct examination will, either inadvertently or otherwise, taint the evidence of the witness. If not done carefully and honourably, the pre-trial interview may serve to suggest, perhaps subtly, to the witness how he should answer certain questions. In addition, there is a theoretical danger (I think it more theoretical than real) that the prosecutor will, by having interviewed the witness, make himself a witness in the case.

There are countervailing advantages which seem to be widely accepted.

First of all, when a witness at his pre-trial interview contradicts what he has said in his earlier witness statement, it is useful for both prosecuting and defending counsel to know of that before the trial begins. Each side can alter his approach to the trial accordingly. This removes the element of surprise.

Secondly, there will be occasional cases where the pre-trial interview convinces Crown counsel that the case is hopeless. Experienced prosecutors are aware of cases which have been dropped by the Crown after pre-trial interviews revealed that that was the proper course.

Third, I think it fair to say that a pre-trial interview tends to expedite the trial process. Any difficulty the witness may have in communicating his evidence will become apparent and assistance can be arranged. The need for a recess while defence counsel considers the impact of some surprising and new piece of evidence and takes instructions is reduced. The degree of nervousness which a lay witness will likely feel in a courtroom and which can, in extreme cases, make the adducing of evidence much more difficult tends to dissipate after a pre-trial interview.

Fourth, the pre-trial interview may reveal to the prosecutor that the witness will, if asked about a certain topic, give evidence which is not admissible. It may be hearsay, or it may go to the bad character of the defendant. Forearmed with this knowledge, the prosecutor can avoid raising the topic in front of the jury. He can and should pass on to defence counsel a warning about the dangers of cross-examining on the subject.

This list of advantages is not meant to be exhaustive. It does seem to me, however, that the advantages are considered in those jurisdictions with fused bars and with substantial experience with pre-trial interviews to at least balance the admitted dangers of the practice.

The first question before me is whether section 111 of the Criminal Procedure Code is broad enough to apply to what is essentially a question of professional ethics. No cases have been cited by either side. I think the answer must be "yes".

Section 111 applies to the "practice of the Grand Court" and to "the mode of conduct and procedure" at trial. It is a general provision designed to accord to a defendant all of the safeguards of the English criminal justice system "so far as circumstances permit".

A pre-trial interview conducted improperly has a significant and obvious potential to affect the fairness of the trial. I consider such an interview to be an aspect of the mode of conduct and procedure at the trial.

However, for reasons given above, circumstances in the Cayman Islands differ from those the Code of Conduct addresses. We have a fused bar. There cannot be a prohibition on pre-trial interviews by defence counsel in a criminal case or by counsel acting in civil matters.

Equality of arms suggests the same rule should apply to Crown counsel. There has never been an express prohibition on pre-trial interviews by Crown counsel in the Cayman Islands, and the

predominant practice has been to conduct such interviews. In this we are following the established practices in Jamaica, Trinidad, Canada, and in other jurisdictions with fused bars.

In my view, the English prohibition on barristers interviewing witnesses prior to trial is not a part of our law because it is caught by the exception expressed in section 111. Circumstances here are different in this respect and they do not fit well with the English practice.

I find that prosecuting counsel in the Cayman Islands are permitted to conduct pre-trial interviews in the manner I have described above.

Mr. Mon Desir has done only that. He has not acted inappropriately. Mr. Mon Desir has made full disclosure of what Mr. Hydes said to him and the circumstances of the interview. He is an officer of the court. I accept that his disclosure has been accurate and complete. It would be inappropriate to expect him to prepare a witness statement. I will not order him to do so.

I expect Mr. Mon Desir to offer to the defence a full admission of fact which would serve to place on the record, if the defence wishes, the fact that Mr. Hydes made certain statements in his pre-trial

interview which are inconsistent with his witness statement. That is the invariable manner in which such contradictions are adduced in these circumstances.

Dated the 10th day of June, 2005

Henderson, J.

Henderson, J.
Judge of the Grand Court