THE ADMISSIBILITY OF CAUTIONED STATEMENTS INTO EVIDENCE AND EDITING OF CAUTIONED STATEMENTS: A PRACTICAL APPROACH

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INTRODUCTION

Cautioned statements are simply oral or written statements made after caution. The caution as usually administered by the police, is supposed to alert the maker of the statement to the potential use that may be made of the statement in a subsequent criminal proceedings. Confessions which are usually embodied in cautioned statement are after all declarations against one's own interest.

THE CAUTION:

"Do you wish to say anything? You are not obliged to say anything but whatever you say will be taken down in writing and may be given in evidence."

WHO MAY USE THE CAUTIONED STATEMENT

The cautioned statement may be totally inculpatory or exculpatory or may be mixed. It depends on the perception of the particular prosecuting attorney as to the state of the evidence for the prosecution and the potential value of the cautioned statement whether strategically or evidentially, as to whether the cautioned statement will be used as part of the prosecution's case. It must be noted, however, that if the prosecution seeks to tender the cautioned statement then it has to tender all of the statement, it cannot tender only that part of it which is probative of the accused's guilt and omit the portions that are exculpatory. SEE RV. CEDRIC GORDON

If it is not used by the prosecution, however, it is difficult

respect of the admissibility of self-serving statements at the instance of the defence. The accused may decide in his defence to recite the narrative of the written cautioned statement in his sworn or unsworn cautioned statement. If prosecuting counsel makes the suggestion in cross examination to the accused that his story is a concoction then defence counsel could re-examined and tender that part of the cautioned statement into evidence which accords with what accused said in evidence-in-chief to rebut the allegation of recent fabrication.

COMPOSITION OF WRITTEN CAUTIONED STATEMENT

It is important for counsel to know what ought to be the basic composition of a written cautioned statement within the context of the Judges' Rules. It is usually in the following sequence:

1. Words of caution
2. Signature of accused (maker of the statement) and date
3. Signature of the witness (sometimes this is another police officer or a Justice of the Peace) and date
4. The request - i.e. the desire of the accused to make the statement.

> "I -X- wish to make a statement and I want someone to write down what I say I have been told that I need not say anything unless I wish to do so and whatsoever I say may be given in evidence."

5. Signature of accused and date
6. Signature of witness
7. Narrative of story begins
8. At the end of each page, signature of accused and the witness along with the date.
9. Narrative of story ends

13. Signature of accused and date

14. Signature of witness and date

15. The certificate of the person (usuallly a police officer) to whom the statement was dictated and who recorded the statement:

> "The foregoing statement was recorded by me in the presence of ..... at .... police station between .... p.m. and ..... p.m. It was read over to the maker who signed it as true and correct."

16. Signature of recorder of statement and date

17. Any alterations or corrections contained throughout the body of the statement should be initialled by the maker of the statement.

The Judges Rules are guidelines for the police to follow and are therefore directory and not mandatory (See the Judges' Rules) infringement of the Judges' Rules would therefore go to weight and not admissibility of the cautioned statement.

In RV. TREVOR WALKER SCCA No. 90/89 where the appellant required to sign a question and answer document, reference was made to Rule 10(f) at pg. 30 by Counsel for the Crown:

> "If the person who has made a statement refuses to read it or to write the above mentioned Certificate at the end of it or to sign it, the senior police officer present shall record on the statement itself and in the presence of the person making it, what has happened. If the person making the statement cannot read, or refuses to read it, the officer who has taken it down shall read it over to him and ask him whether he would like to correct, alter or add anything and to

evidence of the recording policemen or J.P. witness. If that is accepted, then it could provide proof that accused did in fact make the statement.

PRE-TRIAL PREPARATION

It is of the utmost importance for counsel whether prosecuting or defending to peruse the original caution statement as opposed to only the typed copy for several reasons:

1. To see if there are any obvious irregularities on the face of it.

2. To see the signature of the accused and its consistency

3. To see the spacing on the paper, and whether there is a possibility of additions - refer to the sample of the cautioned statement attached

4. To see if there could have been obvious concoction by the police on the face of the document

5. If it appears that the prosecution will be relying on it, then it is important to verify that the typed copy accords with the original hand written statement. Being taken by surprise or being corrected by prosecuting counsel in mid-stride does not look very professional before a jury.

6. To see whether any part of the cautioned statement might have been written by the accused. Smart policemen ask the accused to write the certificate. To subsequently claim that he was beaten then smacks of insincerity.

It is helpful for Counsel, whether, prosecuting or defending to know something about the persons who took part in the cautioned statement taking excerise.

e.g. - Who were the police officers?

- Are they officers who seem to place an overwhelming reliance on cautioned statement to "make their cases at the expense of investigation?

e.g. Re: The Justice of the Peace. In a recent case Counsel for the defence asked a 70 year old J.P.who had witnessed his cautioned statement:

Q. "That is what you were going to do; to witness the statement and at that time the statement write down already?"

A. "Are you suggesting that I would sign a paper that I was not a party to. Your honour, please don't let the counsel do that to me; he is rude. Are you suggesting that I am dishonest to sign what I did not witness?"

- Look at the style of speech in the cautioned statement and match it with the actual speech of the accused.

- Bear all this in mind, when as defending counsel, you are assessing your clients instructions and what sort of suggestions you can put to the prosecution witness in cross-examination. For prosecuting counsel, it is important to know the above so that you can assess the kind of impact your witnesses will have on the tribunal of fact. This is especially so when the weaknesses and strengths e.g. in demeanour of the witnesses may be subtly handled to highlight the prosecutions assertion that the cautioned statement was volunatrily given.

Counsel should also have regard to the professional strengths and weaknesses of the tribunal of fact.

Defending counsel should always try to impress on the accused how important it is to seek tangible evidence e.g. medical re: allegations of beating by the police; but one appreciates that there are practical difficulties here e.g. if the accused is beaten by a padded arm rest or on his footbotton - no marks. The accused perhaps could assist by recalling name or names of co-prisoners in the cells who may or may not have observed the injuries on the person of the accused, so that that person may be called as a witness on the voire dire.

BRIEF OVERVIEW OF THE LAW AND PROCEDURE

Lord Summer in the judgement of the Privy Council gave what could be regarded as the starting point to the question of the admissibility of cautioned statement in IBRAHIM VR (1914) A.C. 599 at 609.

> "It has long been established as a positive rule of English criminal law that no statement by an accused is admissible in evidence against him unless it is shown by the prosecution to have been a voluntary statement, in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage excercised or held out by a person in authority."

In RV RENNIE 1982 1AER 385 at p. 389 - Lordlane, C.J. added the word oppression.

A. NOTIFICATION OF OBJECTION BY DEFENDING COUNSEL TO PROSECUTION COUNSEL

1. Defending counsel's objection to admissiblity is to be made before the opening and therefore prosecuting counsel will not mention even the existence of the cautioned statement in his/her opening.

   I have observed that some defending counsel are somewhat lax and depend on prosecuting counsel to enquire of them and whether they will be challenging the statement or for prosecuting counsel telephatically to know that an objection is to be taken. Sometimes defence counsel is absent briefly and has left no one to hold for him. Most prosecuting counsel would, however, once he will be seeking to put it into evidence "in an abundance" refrain from mentioning it in the opening to the jury.

2. The formulation of the basis of the objection should be in precise and forensic language. Counsel should not be unsure about the basis of his objection. This reflects badly on the defence.

   e.g. "My Lord, I am objecting to the

an oral cautioned is just as relevant as with a written cautioned statement.

B. VOIRE DIRE TO BE HELD BY JUDGE

At the appropriate time the judge will conduct a trial on the voire dire (i.e. a trial within a trial) which may or may not be in the presence or absence of the jury. According to the authority of RV. ANDERSON (1929) AER A.R. 178 the voire dire in the absence of the jury should only be at the request or the consent of the defence. In practice that is a tactical move. Counsel should use the voire dire as s "dry run" if the jury is absent and having gotten the measure of the witnesses modify your style and questions accordingly to derive maximum benefit for your client.

e.g. - Whether to give the jury two bites at the cross-examination of the prosecution's witness re: the admissibility of the cautioned statement, but defence counsel may run the risk of wearying the jury especially if defence counsel has a tedious style and the prosecution's witnesses are impressive, it may strengthen the prosecution's case.

- Whether to expose the accused to the jury re: his cross-examination on the voire dire as opposed to an unsworn statement of the accused in the main trial.

N.B. It must, however, be borne in mind that the crown/the court may not question the accused about the truth of the contents of the statement. WONG KAM-MING VR (1979) 1AER 937 RC.

C. NECESSITY FOR VOIRE DIRE

The locus classicus in our jurisdiction on the subject, i.e. AJODHA VR (1982) A.C. 204 at 220, A Privy Council appeal from Trinidad

signed by the accused and the accused denies that he is the author of the statement but admits that the signature or signatures on the document are his and claims that they were obtained from him by threat or inducement, does this raise a question of law for decision by the judge as to the admissibility of the statement?"

FOUR TYPICAL SITUATIONS MOST LIKELY TO BE ENCOUNTERED IN PRACTICE

In answering this, Lord Bridge of Harwhich at pg. 222, highlighted ur typical situations most likely to be encountered in practice. It very important for counsel to assess according to instructions from accused, the particular situation that obtains in his case and to ceed accordingly.

1. The accused admits making the statement orally or in writing but raises the issue that it was not voluntarily given. The judge must rule on admissibility and if he/she admits the evidence of the statement, leave to the jury all questions as to its value and weight.

2. The accused denies authorship of the written statement but claims that he signed it involuntarily. To be more specific the accused is saying e.g. the police gave him an already prepared statement which he was beaten to signed. The judge here must rule on admissibility and if he admits the statement leave all issues of fact as the circumstances of the making and signing of the statement for the jury to consider and evaluate.

3. The evidence tendered or proposed to be tendered by the prosecution indicates questionable circumstances in which

4. Where the defence is an absolute denial of the prosecution evidence eg. if the accused is saying that no interview took place, no statement was given, no signing of any statement took place, (re written statement it was a forgery) then there would be no issue as to voluntariness arising and therefore no question of admissibility would necessitate the judges adjudication. The judge would merely admit the statement as a matter of law. Applying the 4th limb in AJODHA'S CASE See RV DELFORD GARDENER, CEVAS MURRAY & ALBERT CLARKE SCCA Nos. 216, 217, 218/88. This issue of fact whether or not the statement was made by the accused would be solely for the jury.

I have seen one or two cases where the defence seems to be, that the accused was beaten, was given electric shock on the genitals but he did not make that statement and he did not sign anything. It seems to me that the defence is saying I did not make it. This double two-pronged approach which immediately would cause any tribunal of fact to doubt the sincerity of the case for the defence. This particular limb No. 4 underscores the need for counsel to clearly state the basis for the objection. to have a voire dire in a limb situation limb No. 4 would clearly be a waste of valuable judicial time.

TAINT OF OPPRESSION"

This particular phrase within the Jamaican jurisdiction has gained ırrency and was highlighted in the case of RV HAZEL AND ELDON GRANT .M.C.A. 88/89 (unreported) delivered on the 19th March, 1990. The case ›ncerned the conviction of a bank officer on several charges of fraud ıounting to $1.4 million. This bank officer made an incrimating state- ınt to her superior officers in the bank.

The managing director gave evidence but Holman, the bank security officer, did not. Wright J. at pg. 48 said:

> "..... Hazel Grant was sequestered in Mr. Ryan's office for some five hours with persons in authority, was not allowed to see her husband and was subjected to opression. Although we do not agree that Mr. Ryan's attempt to call the police was any evidence of oppression, we nonetheless have some reservation about the circumstances in which those admissions were made. Mr. Holman is alleged to have shown much hostility to the appellant who was the junior officer among those present and inasmuch as he was not available to allow his conduct to be examined by the court the taint of oppression remains and we conclude that the impugned evidence ought not to have been admitted."

The above-mentioned section of the case was referred to in the case of RV MICHAEL FULLER AND WALFORD WALLACE SCCA NO. 32 & 33/89. In that case forte, J.A. said at pg. 19 that:

> "This was a case (i.e. Rv. Hazel & Eldon Grant) in which the prosecution and the defence were in almost total agreement in respect of the improprieties that surrounded the taking of the statements, not the least of which was the admitted dictation by persons in authority as to what should form the content of the statement. The only other witness who could possibly disagree with the defence remained absent. In those circumstances, based on the evidence before the court, the correct decision should have been to reject the statement. It must therefore have been these factual bases that led Wright, J.A. to find that

" ..... the question of admissibility of a cautioned statement must be decided in the circumstances of each particular case, as it is basically a question of fact upon which the trial judge comes to his decision. The dictation of Wright J.A. in the Grant cases (supra) must therefore be viewed in the context of the particular facts."

The "taint of oppression" concept would seem to embrace the concept of duration of time of the taking of the cautioned statement; the state of the accused's health and well-being where hunger is concerned and also the role played by the person or persons in authority in the making the statement.

Defence counsel's questions at trial (depending of course on his instructions from his client) should seek to encompass the above so that there could possibly be another limb on which the taking of the cautioned statement could be challenged.

Of course, prosecuting counsel would have a duty whether in examination in-chief or re-examination where appropriate to satisfy the tribunal of law evidentially and fact beyond a reasonable doubt that there was no coercion, or promise of reward, or beating, or inducement or "taint of oppression existing at the time of the cautioned statement being taken.

JUDGE'S APPROACH TO THE ADMISSIBILITY OF THE CAUTIONED STATEMENT

The admissibility of a cautioned statement is a question of law for the judge. The question whether the confession has been shown to be voluntary raise an issue of fact.

At page 389 of the judgement in RV RENNIE [1982]1 ALL L.R. 385 LORD LANE C.J. stated:

EDITING OF A CAUTIONED STATEMENT

It is so very important that counsel whether for the prosecution or the defence in his pretrial preparation not only assess the chances of the cautioned statement being admitted but acts on his assessment by contemplating all possible eventualities.

For the prosecutor he must contemplate the strength or weakness of the case without the cautioned statement and also as a "minister of justice" consider whether it contains improper prejudicial material.

For the defence attorney, he should prepare himself that if the cautioned statement is ruled admissible. Are there good grounds for the material in it to be edited?

Applications can always be made to the court to have the cautioned statement edited to exclude improper prejudicial material from the cautioned statement. These applications can be made before the contents of the cautioned statement are read into evidence either by the prosecuting counsel or by defending counsel in the interests of justice. Even if neither counsel raises it, judge also has a discretion to raise the issue once it properly arises.

- what then exactly is editing?
- what according to law is prejudicial material as it relates to editing cautioned statement
- what is the attitude of the courts in this jurisdiction in respect of the whole concept of editing where the cautioned statement of accused incriminated his co-accused?

PREJUDICE

The Oxford dictionary defines prejudice thus:

"to afford ingeniously or unfavourably to

Therefore, if one follows the dictionary definition of prejudice, it would mean that the prosecution is always seeking to elicit evidence which is prejudicial because it may lead to his conviction. Whether the prejudicial effect of evidence outweighs its probative value and should be excluded is another matter entirely.

In the Jamaican Court of Appeal, Carey J.A. in REGINA VS DENNIS LOBBAN S.C.C.A. NO. 148/88 (unreported) (the Peter Tosh killing case), stated at pg. 6, that:

> .... "the practice of editing the statement of an accused person which the prosecution seek to tender, is usually done where the statement contains an admission of a previous conviction or shows other matters reflecting on his character."

The learned judge of appeal referred to Lord Goddard's C.J. observation in TURNER V UNDERWOOD (1948) 1ALL E.R. 859 at 860. Reference was also made to observations made by Lord Griffiths in the Privy Council cases of BARNES & OTHERS VR; SCOTT & OTHER VR (1989) 2AER 305 where he said at pg. 313:

> "the deposition must, of course, be scrutinized by the judge to ensure that it does not contain inadmissible matters such as hearsay or matters that is prejudicial rather than probative and any such material should be excluded from deposition before it is read to the jury."

The editing clearly relates to the accused referred to in the deposition. The problem re: interpretation of "prejudice arises where there is a situation involving one accused who makes statements

He said:

> "Not infrequently it happens that a prisoner in making a statement though admitting guilt up to a certain extent, puts greater blame on a co-prisoner or asserts that certain of his actions were really innocent and it was the conduct of the co-prisoner that gave them a sinister appearance or led to the belief that the prisoner making the statement was implicated in the crime. In such a case that prisoner would have a right to have the whole statement read, and could with good reason, complain if the prosecutions picked out certain passages and left out others."

He had stated earlier in the judgement that:

> "if no separate trial is ordered (ie. if defence counsel had previously made such an application) it is the duty of the judge to impress on the jury that the statement of one prisoner not made on oath in the course of the trial is not evidence against the other and must be entirely disregarded."

Legal cynics may argue as a matter of common sense that the 'law here must be an ass' because the jury would be required to perform mental gymnastics. The principle of law in GUNWARDENE was endorsed and applied in RV DENNIS LOBBAN in the Court of Appeal. At trial Dennis Lobban had been charged for murder with a co-accused. There was eye-witness evidence against Lobban o/c Leppo and a cautioned statement evidence against the co-accused.

Lobban's counsel at trial objected to the co-accused statement being admitted in its entirety because the prejudicial effect of the last sentence in the statement outweighed its probative value. The prejudice affected Lobban.

Carey J.A. at pg. 5 of the judgement relates the main aspects of the cautioned statement and it would be helpful to cite it in full:

> "In the cautioned statement the co-accused stated that he did transport three men to Tosh's house at the material time. He had not known these men before and had been requested by the watchman at his work-place to assist some of his friends. These persons in turn asked him to take them to Barbican. He mentioned the flurry of shooting; the men returning to his van and his driving off and being warned to be silent. That night he learnt of the murder of Peter Tosh. He later saw a photograph of a man in the Star newspaper and his statement then continued:
>
> > "..... and I recognised the photograph as one of the men who I drove in the van to Peter Tosh's house. He sat in the back. He was the man who I saw with the gun when we were coming from the house. The <u>name below the photograph was Dennis Lobban otherwise called Leppo</u>."

The underlined sentence is the "prejudicial material. Carey, J.A. stated at pg. 6 of the judgement that:

> "In the case where one co-accused makes [illegible]

> A trial judge has an undoubted duty to ensure a fair trial but that cannot mean fair to one and unfair to a co-accused."

This particular passage was endorsed along with the case of RV GUNWARDENE in the most recent Jamaican case on the point RV MICHAEL FULLER AND MICHAEL WALLACE SCCA No. 32-33/89. The crown's evidence against the two accused was based on cautioned statement's given by them. Both applicants placed themselves as watchmen at the scene and alleged that they did not participate in the actual shooting of the deceased and at the same time each accused placed the other as actively participating in the shooting inside the room, while he was outside.

Forte, J.A. made the point in the judgement that:

> "..... it may have been important to the makers case that his co-accused and others were the major participants in the act and that he did nothing more than act as a 'watchman'."

On appeal counsel for the accused submitted that letters of the alphabet should have been used as a substitute for the names of the co-accused. The Court of Appeal endorsed Crown Counsel responding submission that for the learned trial judge to have acceded to this request would "have disturbed the integrity of the prosecutions case" - pg. 35.

I would reiterate that view, and emphasize that this is especially so in cases where the prosecution is relying on the concept of common design to ground the conviction against the accused.

Forte, J.A. in RV DENNIE CHAPLIN SCCA Nos. 3 & 5/89
HOWARD MALCOLM
PETER GRANT

In order to properly understand the principle upon which an application to edit may be refused in a case with multiple accused the concept of common design must be clearly understood.

Example: John, James and Bill armed with guns went to rob a store and killed the owner. An eyewitness armed with gun entered the store demanded money and shot the owner. He would not be able to identify the men again.

John makes a cautioned statement to the effect that he along with James and Bill did rob the store, but he remained outside while James and Bill went inside robbed and killed the owner. All three men are on trial for murder.

The Crown's case against John is based on common design. For letters X and Z to be substituted for the names of James and Bill could not tell the jury that John and two other men went on this move because X and Z it may be argued could mean that John went with two women instead of men. John could for his defence say that he was in the area at the time but with two women. The prosecution witness is saying that he saw three men enter the store. There would be a direct conflict and distortion on the Crown's case which would undermine the sincerity of the Crown's case. Counsel for the defence would be entitled to capitalize on it. John could also complain that X and Z being put there could also take away from the jury's perception of

This is where the learned trial judge's duty is so important in warning the jury that the evidence contained in the statements of one accused cannot be viewed as evidence in respect of the case against the other accused.

In fact in RV MICHAEL FULLER AND WALFORD WALLACE the learned trial judge warned the jury several times but also just before they retired to the jury room. This approach was commended by the Court of Appeal and that ground of appeal failed.

CONCLUSION

It is conceded that the police perhaps place an over-reliance on confessions to ground their cases at the expense of the rest of their investigation; in a lot of cases these confessions are the only evidence in the case against the accused. Lord Lane, C.J. in RV RENNIE (1982) 1 AER 385 at pg. 388 states:

> "very few confessions are inspired solely by remorse. Often the motives of an accused are mixed and include a hope that an early admission may lean to an earlier release or a lighter sentence. If it were the law that the mere presence of such a motive, even if prompted by something said or done by a person in authority led inexorably to the exclusion of a confession nearly every confession would be rendered inadmissible. This is not the law. In some cases the hope may be self-generated. If so it is irrelevant, even if it provided the dominant motive for making the confession.

> There can be few prisoners who are being firmly but fairly questioned in a police station to whom it does not occur that they might be able to bring both their interrogation and their detention to an earlier end by confession."

Some persons especially policemen and clergy men would say that confession is good for the soul and the road to heaven. Others may argue that makers of cautioned statement are very often put through hell in order to make cautioned statement which offends their constitutional rights. Confessions are after all declarations against one's own interest.

The question is, what would satisfy all parties that a confession was fairly obtained?

Perhaps the solution can be found in the Wolfe Report. Let us introduce video taping of confessions from the time the accused makes the request to the end of the taking of the cautioned statement. We could also have a health facility whereby the accused is examined before and after by a doctor immediately after the taking of the cautioned statement and the report would be placed on the file.

I think that given the ingenuity of the human mind, however, these suggestions might probably open another 'Pandora's' box with legal, social, moral and most importantly financial implications.