

POLICE INTERVIEWS

Your Words... for you or against you - An article by Aziz Rahman, Solicitor and Jonathan Lennon, Barrister

The *Police and Criminal Evidence Act 1984* (PACE) was introduced to tackle police abuses; especially the practice of ‘verballing’ - officers saying that the suspect made some kind of admission to him when in fact no such conversation took place. PACE introduced a number of Codes of Practice. Code C governs the ‘Detention, Treatment and Questioning of Persons by Police Officers’. The Code provides at C:11.7(a) that an “accurate record must be made of each interview”; in practice this means that interviews are now tape-recorded.

If a suspect is cautioned at the police station that the words he uses may be used against him, then why not the words he uses to a police officer outside of the police station? Any such statements are supposed to be put to the suspect in the formal interview to give him a chance to admit or deny saying what he allegedly said. However, it may be possible to keep such statements out of the evidence altogether; it all boils down to the question ‘what is an interview?’

WHAT IS AN INTERVIEW?

‘Interview’ is defined at C:11.1A as “the questioning of a person regarding their involvement or suspected involvement in a criminal offence...”. or offence which, by virtue of paragraph 10.1 of Code C, is required to be carried out under caution...”. Thus if a policeman comes to your house and before he makes the arrest he asks questions which go further than just establishing identity, or to enable a proper search to be carried out, then that question, or questions, could amount to a pre-caution interview. Even just one question may be an interview: *R. v. Miller* [1998] Crim.L.R. 209. If the conversation can be classified as an interview then the caution has to be given first and it should take place at the police station.

This creates problems for the police in the area of conversations with under-cover officers. In *R v. Bryce*, 95 Cr. App.R. 320, CA the Court of Appeal ruled that the evidence of conversations with police officers should not have been admitted; part of the problem was the lack of a contemporaneous record of the alleged conversation. However, a different result was achieved by the prosecution in *R v Christou and Wright* [1992] Q.B. 979 where the conversations had been recorded. Thus, as we will see, even if there is a breach of the Code it may not rule out the disputed evidence.

EXCLUDING AN INTERVIEW- SECTION 78 PACE

Where there is a breach of Code C it maybe possible to exclude the interview, or parts of it from the jury using s78 of PACE which provides the Court with a general exclusionary power. The extent to which a breach or breaches of Code C will trigger the exercise of the trial judge’s discretion to exclude evidence all depends on the facts of the case. In *R. v. Keenan* [1990] 2 Q.B. 54,90 Cr.App.R. 1, CA, the Court of Appeal considered the ‘anti-verballing’ provisions of Code C and concluded that where there had been “significant and substantial” breaches the evidence so obtained would ‘frequently be excluded’. By s76 of PACE any confession which the defence claim was obtained by ‘oppression’ will lead to the Crown having to prove that it was not obtained by oppression before the confession can become evidence.

Overlaying the PACE protection is the Human Rights Act 1998 and the right to a fair trial under Article 6 of the European Convention. An accused person traditionally has had the right to silence. This is not a concept specifically guaranteed in Article 6, however the right not to incriminate oneself is at the very heart of the fair trial provisions; see e.g. *Sanders v UK* (1996) 23 EHRR 313.

RIGHT TO SILENCE

If you’re reading this you know what the caution sounds like and you know that just saying ‘no comment’ is no longer as un-complicated an option as it once was. Section 34 of the Criminal Justice and Public Order Act 1994 established that if a suspect “failed to mention any fact relied on in his defence...” and he “could reasonably have been expected to mention” such facts then the jury may draw such inferences from the failure as appears proper. There simply is not enough space here to consider this thorny issue in great depth.

Suspects in interview will usually have a solicitor representing them and advising them but, in the final analysis, the decision is down to the suspect. Does he or she feel confident enough to detail a full explanation? Is the suspect likely to be charged anyway, given the state of the evidence? If so, should the suspect speak or be silent? Have others been arrested? What are they saying?

Explaining complicated issues ?

Other issues that your solicitor should be able to advise you about include situations where you are being asked to detail events that took place many months or even years previously. Is it then reasonable to be able to recall events and explain yourself? What about if the questioning involves an examination of detailed financial issues - your solicitor can ask for a delay whilst accountants records are considered or even so that the accountant can attend at the interview to explain transactions which the police regard as suspicious. If the police refuse the application then there may be an argument for staying silent and avoiding the adverse inference direction at Court.

DISCLOSURE

Code C establishes that a suspect has the right to be informed of the nature of the offence (C:11.1A). This usually amounts to pre-interview disclosure by the police to the solicitor. A good solicitor involved in a complex or serious case will try for the maximum amount of pre-interview disclosure and will bear in mind whether others are being interviewed or not and will also bear in mind that in the more serious or complex cases disclosure will be phased. *R v Nottle* [2004] EWCA Crim 599 established that there is no obligation on the police to disclose all evidence to the defence in pre-interview disclosure. However, such disclosure as there is should be sufficient to ensure that the Defendant is not advised by his or her solicitor to remain silent in the interview. In *R v Roble* [1997] Crim LR the Court of Appeal held that a solicitor has good reason to advise their client to remain silent during an interview under caution where the interviewing officer has disclosed little or nothing of the nature of the case against the suspect so that the solicitor cannot usefully advise their client.

Where an experienced solicitor suspects that the police are holding back key material then he or she may advise their client to remain silent or, alternatively produce a written statement from the Defendant to be read at the interview accompanied by 'no comment' to all questions. If this is done because of a genuine concern over lack of disclosure then the solicitor should state that on the recorded interview - this might protect the Defendant at the trial stage.

The mere fact that a Defendant has been advised by a solicitor to remain silent in interview cannot of itself be enough to protect a Defendant from an 'adverse inference' direction from the Judge to the jury about the failure to answer questions; see *R v Condrón and Condrón* [1997] Cr. App. R 185, 191. However, when that case went to Strasbourg the European Court advised that the fact that an accused had been advised to remain silent by his professional advisor had to be given "appropriate weight" before concluding that the adverse inference direction was appropriate (*Condrón v UK* (2001) 31 EHRR. 1).

EDITING INTERVIEWS AT TRIAL

In the vast majority of cases there will be little to argue that the interview should be wholly excluded - indeed sometimes that is the last thing the defence want. However, interviews can, and should be edited by agreement between the parties; see generally Practice Direction (Criminal Proceedings: Consolidation) [2002] 1 WLR 2870. It may be that something that would be otherwise inadmissible is mentioned by a police officer, or simply that the transcripts are inaccurate - in these cases the interviews are edited to exclude the offending comments. If agreement is not reached then the point is argued before the start of the trial. It is worth remembering that if there is a significant breach in one interview then that may make subsequent interviews 'tainted' and also inadmissible; see e.g. *R. v. Canale*, 91 Cr.App.R. 1 and *R. v. Nelson* [1998] 2 Cr.App.R. 399 at 409. Where there is a series of interviews and the Court excludes one on the grounds of unfairness, the question whether a later interview, which is itself unobjectionable, should also be excluded is likely to depend on whether the objections leading to the exclusion of the earlier interview were of a fundamental and continuing nature and if so, if the arrangements for the subsequent interview gave the Defendant a sufficient opportunity to exercise an informed and independent choice as to whether he should repeat or retract what he said in the excluded interview or say nothing.

As we always say, early preparation is the key - but with interviews there is little or no time to prepare and, though the decision is always for the interviewee, the suspect in a serious or complex case just has to hope that his advisor is experienced in advising in serious and complex cases.

AUTHORS

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