COMMENT

The Reaction to Accusation

Colin Wells writes on the prosecution obligation to adduce evidence

As Lord Justice Lawton commented in *R. v. Gerald Joseph McCarthy* (1980) 71 Cr App R 142, one of the best pieces of evidence that an innocent man can produce is his reaction to an accusation of a crime. Accordingly, criminal practitioners should be aware that the Crown are obliged to adduce evidence of comments made by a defendant during police interview if these comments amount to denials of the alleged offence.

This issue was recently considered by the High Court in the case of *Gonzales v. Folkestone Magistrates' Court* (2010) WL 5059147. The claimant applied for judicial review of a decision of the trial bench to refuse to admit into evidence the claimant's comments in police interview, which amounted to an exculpatory mixed statement raising an issue of self-defence.

The claimant, during interview, accepted that he had been present during an argument with his partner, and that although physical contact had taken place he had acted in self-defence. The prosecution served a record of the taped interview but chose not to adduce the interview as part of its case.

Following an application from the claimant's representative at trial, the lay bench held that there was no obligation on the prosecution to adduce the statement. Furthermore, they refused to allow the claimant to adduce the statement during the defence case, ruling that that it was a self-serving mixed statement. The claimant was subsequently convicted of assault and a two-year restraining order was imposed.

The claimant sought to judicially review the decision of the magistrates' court to refuse to admit the interview evidence. The claim was made on two grounds. First, that the claimant had lost the option of not giving evidence since his response that he had been acting in self-defence was not before the court. Secondly, had the claimant given evidence, the court would not have had regard for the statement given almost immediately after the incident, which was consistent with his oral evidence.

In response to this, the prosecution accepted that the interview statement ought to have gone in, but that even had the interview been admitted the magistrates would still have found the claimant guilty, regardless of whether he had given evidence.

The High Court rejected this argument and concluded that it could not be said with any certainty that the claimant would have been convicted if he had had the benefit of being able to rely on his earlier consistent statement. The court cited Lord Justice Lawton's comments in *McCarthy* as to the in evidential importance of a defendant's reaction to accusation, before stating that it was entirely possible that the justices would have at least have had to seriously to consider a defence that was put forward immediately after the accident, and with some degree of particularity, before reaching the same conclusion as they did in fact reach.

The decision of the High Court in *Gonzalez* confirms the principle that although a self-serving statement may not amount to evidence of the facts alleged, it should normally be admitted in evidence as showing the defendant's reaction to an allegation.

Given the fact that records of taped interviews are increasingly rare in magistrates' court trials due to funding issues, it appears that prosecutors are increasingly reluctant to adduce interview evidence as part of the prosecution case. As such, *Gonzalez* serves as useful and timely reminder of the obligations of prosecution counsel, and will no doubt be of assistance to defence practitioners who encounter resistance in this area.

More generally, *Gonzalez* highlights the tactical importance of careful consideration of exculpatory statements made by defendants in interview, especially when advising a defendant as to whether or not they should give evidence. Particularly where self-defence is an issue, it will almost always be tactically sensible to call a defendant to give evidence even when they have advanced self-defence in interview.

To borrow the words of Lord Justice Lawton in *McCarthy* again, "if it is becoming a practice for counsel in criminal cases, when their clients have made exculpatory statements, not to call them in evidence, they should think very long and hard before they continue with that practice, because comment from the Bench is likely to lead the jury to think that there is something very odd about such tactics".

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