

Neutral Citation No. [2011] NICC 39

Ref:

*Judgment: approved by the Court for handing down
(subject to editorial corrections)**

Delivered: **20/09/11**

IN THE CROWN COURT IN NORTHERN IRELAND

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OMAGH CROWN COURT
—————

THE QUEEN

-v-

**MARIANO PERIERA
and
MARITO SOARES**

BILL No. 10/21752

**Ruling on Admissibility of Police Interview Evidence
(Note: This Ruling should not be made available to the Public until the
Conclusion of the Trial)**

His Honour Judge McFarland

1. On the 20th September 2011 I made a ruling in this case as to the admissibility of evidence and these are my reasons for doing so.
2. The Defendants are charged with a number of offences of a sexual nature.
3. Both are Portuguese nationals and were born in East Timor. Their mother tongue is Tetum.
4. Both were arrested and interviewed by the police and the defendants object to the content of the interviews being introduced in evidence at their trial. The objection is based on the failure of the police to ensure that they were given a correct caution prior to each interview.
5. The police had engaged the services of an interpreter Avelina Moreira and it was his function during the interviews to translate the

statements and questions of the police officers into Tetum and then to translate any response made by the interviewee into English.

6. The defendant Pereira was interviewed on the 16th August 2009 (over three sessions) and again on the 4th November 2009 (over four sessions which extended into the early hours of the 5th November 2009). The defendant Soares was also interviewed on the 16th August 2009 (over two sessions) and again on the 4th November 2009 (over five sessions).

7. No complaint is made concerning what the police officers said in English during any of the interviews. In each case the caution was correctly stated - "You do not have to say anything, but I must caution you that if you do not mention when questioned something which you later rely on in court, it may harm your defence. If you do say anything it may be given in evidence." During some of the interviews the officers also attempted to explain the caution by breaking it down into its constituent parts and explaining each part.

8. The Court directed the Public Prosecution Service to prepare a full transcript of what was said during the interviews covering both words spoken in English and Tetum, with an English translation of the words spoken in Tetum. The English translation of what was said in Tetum concerning the caution is set out in the tables below in [9] (Pereira) and [10] (Soares). Some of the dialogue is inaudible and these sections are marked. For ease of reference I have described the Pereira interviews P1-P7 and the Soares interviews S1 - S7. The numbers in parenthesis indicate the page of the relevant transcript.

9. Interviews with Mariano Pereira

Date and Time	Officers	Caution etc
P1 16 th August 2009 16h27 - 17h10	Dalzell & Toner	<p>"so you can choose not to say anything during the interview however they caution you that ... if in this case you do not say anything during the interview ... in this case you take it to court ... it can probably harm your defence. If in this case you say anything ... this can go towards as evidence" (4)</p> <p>"In this case meaning well during the interview you can choose not to say anything .. [inaudible] in case [inaudible] to the court ... if you provide any information in the court which you have</p>

		<p>not mentioned in this interview during the interview ... Ok the court can take the conclusion where this new information came from" (5)</p> <p>" If in this case you do say something during the interview well they can use it as evidence" (5)</p>
<p>P2</p> <p>16th August 2009</p> <p>17h23 - 18h06</p>	<p>Dalzell & Toner</p>	<p>"He cautions you you can choose not to say anything ... bit I caution you that if in this case during the interview if you do not say anything ... in this case this case goes to court ... it will probably harm your defence if in this case you say anything during the interview it will probably be given in evidence" (3)</p>
<p>P3</p> <p>16th August 2009</p> <p>18h12 - 18h50</p>	<p>Dalzell & Toner</p>	<p>"Well [inaudible] OK you can choose not to say anything during the interview..which in this case will be taken to court..it will probably harm your defence OK .. if you say anything in this interview it will probably be given in evidence [inaudible]" (2) and (3)</p>
<p>P4</p> <p>4th November 2009</p> <p>19h50 - 20h33</p>	<p>Dalzell & Carson</p>	<p>"OK Now I am going to caution you about the explanations which she told you earlier..you do not say anything but I must caution you .. when she asks you questions and you don't mention you don't tell .. which you may take to the court ... it will harm your defence...If in this case you do say anything..it can be [inaudible] evidence" (10 - 11)</p> <p>"It means that it means that you do not have to say anything during this interview .. but if you choose not to say anything during this interview and if you go to the court and you provide information information [inaudible] on this incidence [inaudible] take the initiative about the version which you told, the information you provided in the interview" (11- 12)</p>
<p>P5</p>	<p>Dalzell</p>	<p>"She wants to remind you that you are</p>

4 th November 2009 20h41 - 21h24	& Carson	still under caution. You do not say anything but I caution you when they ask you and you do not say anything if this case is taken to the court and will probably harm your defence in this case if you say anything . In this case if you say anything in the interview, it will probably [inaudible] evidence" (4 - 5)
P6 5 th November 2009 00h01 - 00h44	Dalzell & Corrigan	"You do not say anything ...but I caution you that when you mention ..if you avoid questions which you do not mention ..in case this case is brought to court in the future it will probably harm your defence" (4 - 5) "In this case if you do say anything probably it will be given in evidence" (5)
P7 5 th November 2009 00h53 - ?	Dalzell & Corrigan	"She said that you can choose not to say anything but I caution you ...if you do not mention when I question you ...and this case is brought to court it can probably harm your defence. If in this case you do say anything it will probably be given in evidence" (4)

10. Interviews with Marito Soares

Date and Time	Officers	Caution etc.
S1 16 th August 2009 15h00 - 15h26	Toner & Carson	"[inaudible] during this interview you can, when you don't say anything to him [inaudible] in this interview OK But in this case if later on you say something when this case is brought to the court you said [inadible] that the court will decide that, well, [inaudible] OK He is giving you this caution alright?" (5) "if in this case you said something he gives [inaudible] OK evidence" (5) "OK Basically this is to" (6)

		<p>“That you can say nothing to him in this interview during this interview” (6)</p> <p>“If in this case you said something new, you provide new information in the court ... which you don’t mention during this interview ...the court will take [inaudible] that these information [inaudible] .. if in this caser you said something to him [inaudible] probably [inaudible] evidence” (6)</p>
<p>S2 16th August 2009</p> <p>15h47 - 16h12</p>	<p>Toner & Carson</p>	<p>“He cautions you that in this case if you say anything during the interview OK it can be used as witness OK” (3)</p> <p>“If you do not say anything during this interview well like what he said if this case goes before the court and in the end if you say something the court can decide [inaudible] the information on [inaudible] thesem OK It will make a conclusion [inaudible] these conclusions alright” (3)</p>
<p>S3 4th November 2009</p> <p>13h59 - 14h42</p>	<p>Robinson & McGuinness</p>	<p>“You don’t say anything...But I caution you...if you do not say anything...when they ask you questions...of which in case you take them forward...to the court...it may prejudice your defence if you say anything...it may possibly be given in evidence” (8) and (9)</p> <p>“In simpler terms...if you don’t say anything you don’t tell him</p>

		anything today ... if this case goes to court and you mention something in the court of which you have not told him during this interview the court will make a decision ... it will make a decision on whether they will or will not believe what you tell them" (9) and (10)
S4 4 th November 2009 14h52 - 15h35	Robinson & McGuinness	"He is reminding you .. you are still within caution" (6) "So he reads this caution to you...You do not need to say anything but I must caution you if you do not say anything mention anything when asked .. which ..this case is taken before the court it will probably harm your defence. If in this case you say anything it will probably be given in evidence" (7) and (8)
S5 4 th November 2009 16h28 - 17h12	Robinson & McGuinness	"Marito once more he wants to remind you here that you are still under caution" (6) "So he will read the caution...to you..Well you don't say anything but I caution you that if you don't mention when I ask you questions which if this case is brought to the court it will probably harm your defence" (6) and (7) "If in this case you say anything it will probably be given in evidence" (7)
S6 4 th November 2011-09-15 17h17 - 17h53	Robinson & McGuinness	"He reminds you once again Marito..You are still under caution" (6) "and he [inaudible]..read the caution..to you once again..You can choose not to say anything..but I must caution you..the caution is

		that if you do not mention..when you are questioned..which..this case is brought before the court later on..and can harm your defence..if you say anything..it will probably become evidence" (6) to (8)
S7 4 th November 2011-09-15 22h17 - 22h48	Robinson & McGuinness	"He will caution you once more...You can choose not to say anything ...but I must caution you ...that if you don't say anything ...when I question you ...which you will bring forth bring forth to the court ...it will probably harm your defence if you say anything you will probably be given as evidence" (6) to (8)

11. The approved form of caution is required by the Code of Practice issued pursuant to Article 65 of the Police and Criminal Evidence (NI) Order 1989. This should be administered after arrest and then prior to any interview conducted by the police.

12. Its purpose is three-fold. First to alert the interviewee that he is entitled to remain silent - "You do not have to say anything". This confirms the common law right of silence and the right against self incrimination, which right is also contained within the European Convention on Human Rights. Secondly, the interviewee is warned that in certain circumstances a court could draw an inference in his failure to answer some of the questions - "but I must caution you that if you do not mention when questioned something which you later rely on in court, it may harm your defence." This inference may be drawn by virtue of the provisions of the Criminal Evidence (NI) Order 1988 (as amended by para 61(3)(b) of Schedule 10 to the Criminal Justice and Public Order Act 1994). It does not erode the right to silence, but merely alerts the interviewee to the possibility that his defence may be harmed by a court drawing an adverse inference should he later rely on something that he could have told the police during the interview. Finally, the interviewee is alerted to the fact that anything that he does say may be given in evidence at a trial - "If you do say anything it may be given in evidence".

13. It is acknowledged that a direct word for word translation from the English into any foreign language can be very difficult as each language will have its syntax and its own method of expressing certain words and phrases. The English Court of Appeal has given some guidance in two

cases involving translation of the caution, although both cases do turn on their particular facts. In R -v- Akhtar (unreported) 10th March 1998 at page 9 it dealt with a complaint that the “interpreter who interpreted the interview to Mr. Aktar may not have literally translated into language of Mr. Aktar the terms of the caution.”. The caution was translated in the following terms - “If you wish you may remain in silence. This is your right, but if you don’t reply to us now about anything and when you do go to court and try to answer for these things, then this may go against you” No translation was offered for the final part - the fact that anything said may be given in evidence. The Court of Appeal rejected the defence arguments in the following terms -

“The translation accurately and realistically got across to the person listening to it the substance of the caution. That is really all we can say about it. Secondly so far as Mr. Aktar was not told what he said might be given in evidence, that point goes completely out of the window because he was attended at this interview by an English solicitor, who heard the caution and was in a position to advise him to stay silent: which is what she did”

14. In R -v-Koc [2008] EWCA Crim 77 the second part of the caution was translated in the following terms - “If you refuse to say anything..now during this questioning..it may be, it may, it may damage your defence..if you say anything in court which does not tally with what you are saying now, then that..the court will put less emphasis on what you are saying in court and more emphasis on what you are saying now” The Court of Appeal agreed with the trial judge’s assessment that although the translation of the caution was not impeccable, the essential elements of it had been brought home to Wiinbald, namely that he did not have to answer any questions if he did not wish to do so, that what he said would be recorded and might be given in evidence, and that if he relied at court on anything not said in interview, that it might damage his case.

15. The principle to be derived from Aktar and Koc is that whilst a complete translation is desirable, the fact that it is not word for word correct does not mean that a caution has not been administered adequately. The principle factor is that the interviewee should be told of his rights and obligations in a language that he understands and that the full gist of the caution is relayed properly. This coupled with the presence of a solicitor and the full recording of the interview should allay any fears a court may have. However each case must turn on its individual circumstances.

16. Mr. Steer (who appeared with Mrs. Dinsmore QC) accepted that the correct cautions were not administered correctly in the mother tongue of the defendants, and there was therefore a breach of the PACE Code C. However, notwithstanding these breaches, the content of the interviews should still be admitted, with, if necessary, suitable advice and direction to

the jury. He suggested that the gist of the caution was given and explained and following the principles set out in Aktar and Koc the court should infer that each defendant understood the nature of the interview and their respective rights. It also suggested that the presence of a solicitor throughout each interview, and in some cases intervening to advise the client, was a sufficient safeguard.

17. The defendant's objections are under Articles 74(2)(b) and 76 (1) of the Police and Criminal Evidence (NI) Order 1989.

18. A brief analysis of the interviews would indicate that a sufficient translation of the final part of the caution - what was said may be given in evidence - was given. Mr. Duffy (with whom Mr. Gallagher QC appeared) for Pereira, offered some criticism of the use of language - "this can go towards as evidence", "will probably be given in evidence", "it can be evidence", "it can be used as witness OK" and "it will probably become evidence" - but I am satisfied that the clear message was that anything he said had the potential to be used as evidence at a trial. Mr. Duffy did not press this point with much enthusiasm and I do not propose to say anything further on this aspect of the translation.

19. The main thrust of the arguments raised by both Mr. Duffy and Mr. McCrory QC (with whom Mr. Boyd appeared) for Soares, was based on two issues. The first part of the caution was not only incorrectly translated, but with the translation offered it advised each interviewee that his unqualified right of silence was in fact qualified. It was therefore not only inadequate, but it was incorrect. In addition the second part of the caution when translated was not translated in any comprehensible fashion.

20. It would appear that the first part of the caution dealing with the right to silence, when translated in nearly all the interviews was more or less translated correctly - emphasising the right to silence. However the translator did not finish there and in the majority of the interviews merged the first and second parts of the caution together, but by omitting the essential part of the second ended up giving advice that although the interviewee was advised that he had a right to remain silent, he was then advised that if he did not say anything then this would harm his defence. The police, through the translator were therefore qualifying a basic right of any interviewee which is the unqualified right to remain silent. This is clearly the case in P2, P3, P4 (first explanation), P5, P6, P7, S3 (first explanation), S4, S5, S6 and S7.

21. In the case of what should be the second part of the caution, in only two interviews out of seven in the case of Pereira (P1 and P4), and in only three interviews out of seven in the case of Soares (S1, S2 and S3) was there any attempt to translate the second part of the caution, but in each case

there is no clear and definitive meaning. In some cases there were inaudible parts. The court could not attempt in such a case to read into the interview words and phrases that may have corrected the translation. The translation offered was so poor that it would have been mere speculation to attempt to correct the translation by filling in the missing parts. In the remaining five interviews with Pereira and four interviews with Soares no translation was offered at all of this part of the caution.

22. In only one, S3, does the translation come anywhere close to being accurate. In S3 it is stated- "If you don't say anything you don't tell him anything today if this case goes to court and you mention something in the court of which you have not told him during this interview the court will make a decision it will make a decision on whether they will or will not believe what you tell them". This still has its deficiencies, but there is at least an effort to try to explain what may happen if Soares later attempts to rely on something he does not mention to police.

23. I am satisfied that I should not exercise my discretion in this case and allow the admission of the interviews. I have looked at each defendant in turn, and at each interview in turn. I have considered the role of each solicitor taking into account any interventions they have made to endeavour to see if any deficiencies in the translation could be ameliorated.

24. In Pereira's case in each of his seven interviews he was told that his absolute right to silence was qualified and that it may harm his defence if he did not answer questions. In two (P1 and P3) there was a poor attempt to explain the second part of the caution. The intervention from the solicitor only came during the final two interviews, but each intervention related to very specific questions when advice was offered (and apparently accepted) that Pereira should not answer. I am satisfied that in the circumstances the replies given by Pereira during any of his interviews should not be admitted in evidence. The caution was not only incorrectly administered, but he was given incorrect and dangerous advice, namely that if he did not say anything it could harm his defence. Such advice could have had the effect of inducing him to speak when he could have remained silent. This situation could not realistically be cured by suitable instructions and advice to the jury.

25. In the case of Soares the situation is slightly different. In S1 and S2 he is not given the correct caution, but neither is he told that it may harm his defence if he says nothing. There are numerous instances when he replies "no comment", which may suggest that he did understand his rights. However it is noteworthy that at page 27 of S3, when asked why he had made the "no comment" replies in the earlier interviews, he said "I didn't understand it then". S3 is an important interview as the replies

given are of some relevance. The caution opens with "You don't say anything...But I caution you...if you do not say anything...when they ask you questions...of which in case you take them forward...to the court...it may prejudice your defence if you say anything...it may possibly be given in evidence" This is fairly meaningless in content. On the positive side it omits the later errors (see below) but it does not give an unequivocal statement that he has a right to remain silent. I do not believe that that can be inferred by the statement "it may prejudice your defence if you say anything". There are still deficiencies in the second part, and critically no advice is given about harming his defence, just that the court will make a decision on whether or not to believe him should he mention something new later. In the remaining four interviews an incorrect caution is administered advising Soares that he does not have an unqualified right to silence. There are no interventions from his solicitor in any of interviews of any note.

26. As in the case of Pereira, I am satisfied that in the circumstances the replies given by Soares during any of his interviews should not be admitted in evidence. The caution was not only incorrectly administered, but particularly in the later interviews he was given incorrect and dangerous advice, namely that if he did not say anything it could harm his defence. Such advice could have had the effect of inducing him to speak when he could have remained silent. This situation could not realistically be cured by suitable instructions and advice to the jury.

27. The general principles which apply to a court exercising its discretion pursuant to a breach of the Code are set out in Archbold (2011 Edition) at 15-15, and are derived from two English Court of Appeal decisions - **R -v- Absolam (1988) 88 Cr. App. R. 332** and **R -v- Delaney (1988) 88 Cr. App. R. 338**. Pursuant to what I consider to be a significant and substantial set of breaches, I am satisfied that the rationale behind the content of the pre-interview caution was defeated by the method by which it was explained to each defendant. In these circumstances the evidence obtained pursuant to the breaches should not be admitted.