

DOMINICA

IN THE COURT OF APPEAL

CRIMINAL APPEAL NO. 5 of 1982

BETWEEN:

DIRECTOR OF PUBLIC PROSECUTIONS - Appellant

and

PATRICK JOHN
MALCOLM REID
JULIAN DAVID
DENNIS JOSEPH

- Respondents

Before: The Hon. Sir Neville Peterkin - Chief Justice
The Honourable Mr. Justice Berridge
The Honourable Mr. Justice Robotham

Appearances: Elliott Mottley Q.C., Lloyd Barnett and Sylvia Bertrand
for the Appellant.

Berthan MacCauley Q.C., Randolph Williams and
Margaret MacCauley for the Respondents.

1982: September, 27, 28.

JUDGMENT

ROBOTHAM, J.A., delivered the Judgment of the Court:

This is an appeal by the Director of Public Prosecutions for the State of Dominica in the exercise of a right conferred by Sections 36 and 37 of the West Indies Associated States Supreme Court (Dominica) Act No. 10 of 1969, as amended by the West Indies Associated States Supreme Court (Dominica) (Amendment) Act No. 16 of 1981.

The four respondents were on May 12, 1981 jointly arraigned before Mitchell J. and a jury on two counts of an indictment. The first count charged that they on divers days between September 19, 1980 and April 29, 1981, in the Commonwealth of Dominica and elsewhere, conspired together with Michael Perdue and Wolfgang Droege and with other persons unknown to overthrow the lawfully constituted government of Dominica by force of arms. The second count which was framed as an alternative to count one charged them with conspiring together with Michael Perdue

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and Wolfgang Droege and other persons unknown, to assault police officers in the execution of their duties of guarding the Police Headquarters at Roseau, Dominica.

The trial continued until May 19, 1981 when, the State having closed its case, a submission of "No Case" was made in respect of each of the four accused. On May 20, 1981 Mitchell J. upheld the submissions and directed the jury to return a formal verdict of not guilty in respect of each of the accused. They were all duly discharged on both counts, and on that same day, the Director of Public Prosecutions lodged this appeal. The right of appeal is given in the amendment in these terms:

"37 - (2) Where during the trial of a person on indictment the trial judge decides on a point of law or evidence, the Director of Public Prosecutions, if dissatisfied with the trial Judge's decision may appeal by way of special case to the Court of Appeal for a determination of the point in issue: Provided that where a jury has deliberated and returns a verdict of Not Guilty there shall be no appeal against such a verdict."

The conduct of the case for the State would have necessitated the calling of two expert witnesses on handwriting, to prove that a document found in the possession of Michael Perdue when apprehended in the United States of America, was signed by the accused Patrick John, and that other documents were in the handwriting of the accused Malcolm Reid. Towards this end, it was sought to put in evidence passport application forms alleged to have been written up and signed by Patrick John, so as to form the basis of the comparison with the disputed writing found in the possession of Michael Perdue. The learned trial Judge however, refused to admit these documents in evidence on the ground that they had not been proven to his satisfaction, (in accordance with Section 19 of the Evidence Act Cap. 64) to be in the genuine writing of Patrick John. In respect of Malcolm Reid the State sought to put in a diary alleged to have been

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written by him, but this attempt met with a similar fate. It might here be mentioned that Section 19 of Cap. 64 is in identical terms with Section 8 of the Criminal Procedure Act 1865.

The effect of these rulings precluded the State from putting the evidence of the handwriting experts before the jury and, as counsel for the State puts it, whilst it did not demolish their case in the light of the evidence remaining, yet it substantially strengthened the no case submission. The questions therefore which the learned Director of Public Prosecutions is asking this Court to answer are:

- (1) Did the learned trial Judge err and misdirect himself in law in refusing to admit the comparative documents in respect of (a) John and (b) Reid and
- (2) Did he err and misdirect himself in law in upholding the No-Case submission on the ground that the evidence for the prosecution was manifestly unreliable and it was unsafe that the case should be left to the jury?

These questions are inter-related and will of necessity involve an examination of the evidence adduced on behalf of the State. The two preliminary objections raised on behalf of the respondents will also have to be dealt with in due course. For completeness we state them at this stage. They are:-

- (1) That the purported special case does not raise a question of interpretation or construction of a point of substantial law, nor any point of adjectival law relating to the evidence.
- (2) The amendment giving the Director of Public Prosecutions the right of appeal is unconstitutional null and void.

/The facts.....

The Facts of the State's Case:

On July 23, 1980 after the due holding of elections the Honourable Mary Eugenia Charles was sworn in as Prime Minister of Dominica. Prior to the elections, an interim government was functioning headed by the Honourable Oliver Seraphin, and immediately before Seraphin took office the accused Patrick John was the Prime Minister. Malcolm Reid was a Captain in the Dominica Defence Force, and second in command.

The first witness put forward by the State was Algernon Maffie, who gave his occupations as that of seaman and farmer. He was known to be a notorious character and on his own admission had nine previous convictions, six of which involved the use of violence. In August 1980, there was a charge of Murder pending against him, but he was not then in custody as he was one of those who took leave of the prison when it was destroyed by hurricane Daved in August 1979. He was never retaken into custody, but the charge against him was not formally discontinued by the Director of Public Prosecutions until December 14, 1981. It will be seen therefore that between September 1980 and April 1981, the relevant dates in the indictment, the charge of Murder was still so to speak hanging over his head.

Maffie testified that he knew the accused Malcolm Reid for the past year and seven months, and ever since December 1980, had been to his home on more than one occasion. On the first visit in mid-December 1980 he went there with one Henry Esprit, who introduced him to Reid as the one who would represent "the Dreads" in the operation of the "coup plot". When asked, Reid told him that they would be getting help from friends outside of Dominica, (naming the United States of America_ and that the help would take the form of finance, arms, amunition and some mercenaries, the purpose being to take over the Dominica Police Force, and to overthrow the Dominica Government. Reid also told him he had plans drawn up, and that he wanted him to study those plans. Maffie said he told Reid he

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would have to study the plans before making any decision. He then left.

Subsequent to this, Reid paid several visits to the home of Maffie, most of all for the purpose of using the telephone to make collect overseas calls to Michael Perdue in Houston, Texas, United States of America.

On a Sunday in January 1981 Maffie went to Reid's home, and whilst there the accused, Patrick John and Julian David arrived. John went and spoke privately to Reid at first, and then he heard John say to Reid that he (John) would like to use more locals than foreigners, and that between sixty to eighty men "would be good enough for the operation". Reid then asked John "what about if we meet stiff resistance" and John's reply was "you will have no choice but to use two hundred (200) mercenaries". Reid then asked Maffie if he could mobilize at least twenty dreads, and Maffie said he could try. Maffie then suggested that they should get a Suzuki jeep for transportation and John's rejoinder was ~~that he did not~~ think they could raise that amount of money to buy a new jeep, but he could promise to get a good second hand land rover or Volkswagen with which to make his movements. The accused Julian David then said "I think we have that kind of bread (meaning money) in our possession". John and David left but before Maffie himself left Reid gave him a small slip of paper with a phone number and the name "Michael Perdue, Houston, Texas" written on it, and asked him to telephone Perdue, collect. He told him what to say to Perdue, and as soon as Maffie got home he placed the call to Texas, spoke with Perdue and delivered the message.

In the course of this conversation Perdue asked Maffie to meet him in Texas, as he could not say on the telephone what he would like to say. Texas was not agreeable to Maffie, neither was Toronto, so it was agreed between them that they should meet in Antigua. When Maffie asked Perdue

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about the fare, Perdue told him that he would send Three hundred ollars U.S. (\$300.00 U.S.) through the Royal Bank of Canada in Dominica in care of Julian David. The date agreed for the meeting in Antigua was January 30, 1981, and the place was the Castle Harbour Hotel Club and Casino. This information was relayed to Malcolm Reid on the following day when Reid came to Maffie's house.

On January 27, 1981 and again on January 28, Maffie went to the office of the accused Julian David to enquire if the money Perdue was supposed to be sending had arrived. It had not. He returned on the January 29, when David called the Bank and was told that the money had arrived. Mario Toulon, an officer of the Royal Bank of Canada gave evidence of the cable transfer of Four hundred dollars U.S. (\$400.00 U.S.) from the United States of America, the proceeds of which were paid to Julian David a customer of the Bank. The slip evidencing the transaction was put in evidence.

When David got word that the money had arrived, he made a telephone call and arranged for two airline tickets to be made out in the names of Algernon Maffie and Malcolm Reid, to enable them to travel to Antigua on January 30, 1981. Maffie got his ticket from Reid later that same day.

On January 30, 1981 Maffie met with David as arranged at 10.15 a.m., on the main road, and together they went to the home of Patrick John. Reid failed to turn up on time, so it was decided that Maffie should accompany David into town to look for Reid. As Maffie was about to leave John placed an envelope, sealed and stapled, in his hand and told him to give it to Reid for delivery by him to Perdue. Reid was located and Maffie said he handed over the envelope to Reid. Julian David arranged transportation to the airport, but when Reid and Maffie arrived there, the plane had left. They returned to the airport on January 31, 1981 and together boarded a flight for Antigua. Immigration cards were put in evidence to establish beyond the shadow of a doubt that Reid and Maffie

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left Melville Hall airport, Dominica on January 31, 1981, that they were landed in Antigua on the same day, and that they returned to Melville Hall airport on February 1, 1981. The immigration cards gave their intended address in Antigua as the Castle Harbour Hotel, and the hotel's room occupancy cards were put in evidence to show that Reid occupied room 30 at the hotel, and Maffie occupied room 29.

In the meantime on January 30, 1981, Michael Perdue arrived in Antigua on B.W.I.A. flight 409 from Miami, Florida, United States of America, and was processed by Sargeant Winston Nathaniel, an Immigration Officer, who testified that he recognized Perdue as a regular visitor to Antigua. The intended address given by Perdue on his immigration card, was Castle Harbour Hotel. Nathaniel processed Perdue for departure from Antigua on February 2, 1981.

After the arrival of Maffie and Reid in Antigua, they went to room 30 at the Castle Harbour Hotel which was occupied by Perdue, and there Reid handed over the envelope received from Patrick John. Perdue opened it and took documents therefrom, which were read. The talk between them eventually turned to the merits of the M16 rifle as against the Bushmaster, with Perdue expressing a preference for the latter, and informing them that he could get his hands on a few. Perdue handed over to Reid during the course of their talk the sum of Fifteen hundred dollars U.S. (\$1500.00 U.S.) in one hundred dollars bills telling him that it was to help to meet expenses in Dominica. They went to lunch during which they discussed the geography of the Dominica Police Station and the various points of entry. After lunch Reid gave Maffie "a copy of the contract" to study, for further discussion with Perdue. This was one of the documents that came out of the envelope from Patrick John. Later that night "the contract" was discussed and Perdue said that the deal which he made was for Two hundred thousand dollars U.S. (\$200,000.00 U.S.) and that he wanted it as soon as possible. He agreed to settle for One hundred and fifty

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thousand dollars U.S. (\$150,000.00 U.S.) in three weeks time, and the remainder at a later stage. Reid said he would agree with that but it would have to be settled by the "Council". The name "Black Revolution Council" appeared according to Maffie in the copy contract which Reid had given him to read. He further said that "the Council" had been discussed at previous meetings with John, Reid, David, and Dennis Joseph, and that its purpose was to replace the Government of Dominica. On February 1, 1981, Maffie and Reid, preparatory to their departure from Antigua were at the hotel bar with Perdue, when a telephone call was put through to Perdue. Perdue spoke on the telephone and then told Reid that Julian (David) would like to talk to him. Reid spoke on the telephone and shortly after they both left for Dominica.

On February 3, 1981, Reid took Maffie to Patrick John's home. Julian David and Dennis Joseph were also present. They all five discussed the Contract and the amendments apparently emanating from the meeting with Perdue. When it came to a discussion of the Two hundred thousand dollars U.S. (\$200,000.00 U.S.) which Perdue was demanding, John is alleged to have said that Perdue was crazy as they were not sure of raising that kind of money immediately.

On the following weekend another meeting was held at the home of David Kentish at Canefield. All five were again present as on February 3. At that meeting the feasibility of the landing site for the mercenaries as given by Malcolm Reid was discussed. This was to have been the Dominica Mining Co. at Rockaway beach. The time of landing, 2.00 a.m., was also agreed. John gave instructions for information to be obtained as to who controlled the HAM radio sets, and for transportation for the mercenaries to be organized. Further John directed that the twenty dreads to be provided by Maffie along with Reid's men, were to be on the grounds at Roacaway beach to await the landing operation.

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Also at this meeting offices were allocated within the Council. Patrick John - would hold the position as Chairman of the Council, Prime Minister, Minister of Foreign Affairs and Defence. Malcolm Reid - would be in charge of the Military with Maffie as his second in command. Julian David - would be the Council's treasurer, and Dennis Joseph - would be in charge of radio and communications.

Finally the decision was taken at the meeting that Perdue should go ahead as planned in respect of the operations, and should set a date for its execution in Dominica. Maffie concluded his evidence by saying that he never attended any other meetings of the Council.

Quite apart from the notoriety of Maffie, it will be clearly seen from the foregoing that Maffie would have had to be treated not only as an accomplice, but as a person who had an interest to serve, in the light of the Murder charge pending against him.

At this stage, it would be convenient to show what evidence was led by the State to show the presence of Michael Perdue in Dominica over the relevant period. Sargeant Michael Sylvester, an Immigration Officer, testified that on February 18, 1981 he processed Perdue into Dominica as an incoming passenger. Also on September 20, 1980 he processed him as an outgoing passenger, on December 13, 1980, he ~~was processed as coming in~~ and as going out on December 17, 1980.

Rollins Laurent, a security guard at the Anchorage Hotel in Dominica testified that on the night of December 16, 1980 whilst he was on the 10.00 p.m. to 7.00 a.m. shift he saw Perdue on the balcony of his room talking to Malcolm Reid. Perdue left on the early morning of December 17, as stated by Sargeant Sylvester.

The scene now shifts to New Orleans, Louisiana in the United States of America.

John Osburg told the Court that he was a special agent with the

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Bureau of alcohol, tobacco and firearms, which is an agency of the United States Government. On February 23, 1981, he received a call from Michael Howell who was personally known to him. Howell gave him certain information. He knew Howell to be the owner of a fifty-two foot ocean going vessel called the "Manyana". On February 27, he went on board the Manyana, and was there when Howell received a telephone call which he (Osbourg) recorded on tape.

On March 5, 1981 whilst Howell and himself were on board the boat Michael Perdue arrived. Perdue told them both that he wanted to charter the Manyana to sail from New Orleans to Dominica. The purpose of the voyage he said was to transport arms, ammunition, men and military equipment for the purpose of a military coup on the Island of Dominica. Perdue produced to him maps of the Island, a street map of the city of Roseau, and a hand drawn diagram of the police station and government facilities which were to be attacked. He further said he had a contract with the ex-prime Minister and that he had the support of the military, in that he was working with the head of the military "Major" Reid, and Captain Robertson. The cost of the charter was agreed:-

\$ 5,000.00	-	immediately
\$ 10,000.00	-	prior to leaving the United States of America
\$ 3,000.00	-	on return to the United States of America
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\$ 18,000.00		

The Five thousand dollars (\$5,000.00) was duly handed over by Perdue to Osburg. On March 13 and 26, Osburg spoke to Perdue at his home in Houston, Texas, and again on April 10. Food for the trip was purchased with Six hundred dollars U.S. (\$600.00 U.S.) which Perdue sent by money order in a letter to Howell.

Osburg as would be expected kept an accurate record of the dates on which he spoke to Perdue by telephone and on April 26, 1981 he boarded the vessel along with another special agent, Lloyd Grafton. At

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about 7.00 p.m. Perdue arrived accompanied by Wolfgang Droege, whom Perdue introduced as his second in command "in the coup attempt in Dominica". Perdue paid him Nine thousand eight hundred dollars (\$9,800.00) and placed his chevrolet car for the short fall of Two hundred dollars (\$200.00).

Perdue gave Osburg maps of the Island and stated that the main objective once upon the Island was to attack the gaol and police facility, and to free Patrick John the ex-prime Minister and his men. It is a matter of record that at this time all four accused were detained under emergency powers then in force in the State of Dominica.

The departure date was fixed for 10.00 p.m. on April 27. Osburg had assumed the role of a deck hand for the voyage and an associate of the owner Howell. Perdue, Droege and nine other men arrived at the departure site as planned and unloaded guns, ammunition, and military gear into an unmarked United States Government vehicle. The arms and the men were transported to the Marina where the men were all arrested. So ended the Dominica coup attempt. An examination of the arms and ammunition revealed twenty-six sticks of dynamite (one pound), a Nazi flag, a confederate flag, nine pistols, ten shot guns, thirteen long rifles, several Bushmaster rifles and five thousand rounds of ammunition.

Osburg took from Perdue a briefcase which on examination revealed a colt .45 pistol, a passport issued to Perdue, two typewritten contracts with corrections, a letter of agreement signed with the name "Patrick John", and a small sheet of note paper with writings. Osburg finally told the Court that Perdue at the time he was giving the evidence, was incarcerated in the Federal Penitentiary in Tyler, Texas.

Before parting with the summary of the evidence, there is one final bit of evidence to which I should refer and that is the evidence of Martin Tulon of the Royal Bank of Canada that on April 10, 1981 a draft for the sum of Four thousand eight hundred and thirty-six dollars and sixty-six

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cents E.C. (\$4,836.66 E.C.) was paid to Julian David by virtue of a cable transfer to him from Michael Perdue through the First City National Bank of Houston. David was then in detention and the money was collected by his brother on his producing to the bank a written authority from accused Julian David.

Such then was the factual evidence which the State tendered in support of the two counts of the indictment. It was proposed to bolster this body of evidence with the evidence of two handwriting experts, but as previously indicated, the State was not in a position to do this, once they were not permitted to put the comparative documents in evidence. It is therefore on the basis of this evidence which has been summarized above, that the no case submission was made and upheld. The correctness or otherwise of that decision is one of the answers being sought by the Director of Public Prosecutions.

The Disputed Writings and Admissibility of the Comparative Documents

This disputed writing in respect of the accused Patrick John was a typewritten agreement dated September 20, 1980 addressed to Michael Perdue and signed "Patrick John". This was one of the documents found in the briefcase of Perdue by the United States agent, Osburg, upon his apprehension. It was tendered in evidence as Exhibit T.

The disputed documents in respect of Malcolm Reid were (1) the small sheet of note paper with writings which was also found in the briefcase of Michael Perdue at the same time that Exhibit T (above) was found; (2) an undated note addressed to "FRED" which was handed over to Constable Pacquette at the Dominica Police Headquarters on March 5, 1981 by Ronnie Roberts, a prisoner then in custody at the lock up where Malcolm Reid was also confined, and purporting to have been written by the said Reid. Roberts was not called as a witness to say from what source the document came.

It was Oliver Phillip, the Commissioner of Police for Dominica who

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was called to give evidence relating to the passport application form of the accused, Patrick John, sought to be put in evidence for comparison with the signature Patrick John on Exhibit T.

The learned Judge ruled the document to be inadmissible, and the circumstances surrounding the ruling can best be recaptured by quoting from extracts of the Judge's notes. Oliver Phillip said in answer to Mr. Mottley for the State:-

"..... In addition to my office as Commissioner of Police, I hold the office of Chief Immigration Officer. Applications for passports are made to my office.....after the passport is issued the form is filed in the Immigration Office under my control....."

He was then shown a passport application form dated June 29, 1979, by Mr. Mottley for the State and Mr. MacCauley objected to its admissibility stating that the proper officer to put in the document should be the person who processed the application, and further that it was irrelevant. Mr. Mottley in answer to the Court said that the witness did not make the document nor did he see it made. The learned Judge ruled that the document was inadmissible as coming from the witness who knew nothing about it and the circumstances of its making, and that it had not been proven to his satisfaction to be the writing of Patrick John.

Mr. Mottley then referred the Court to paragraph 1262 of the 39th edition of Archbalds which states that the methods of proving the handwriting of a person may be:-

- (1) By a person having knowledge of it.
- (2) By some person who has a knowledge of it from having seen him write even once only.
- (3) By someone having been in the habit of corresponding with him, or of acting upon his correspondence with others.

He referred the Court to Section 19 of the Evidence Act Cap. 64 and launched a second attempt to have the document admitted. On further examination Oliver Phillip said:-

/I am.....

".....I am familiar with the handwriting of Patrick John. Mr. John has been a member of Government. He has been Premier and Prime Minister of the Government. During the period he was Premier and Prime Minister he was also Minister responsible for National Security. As Minister of National Security I was responsible to him for National Security. I therefore had during that period occasion to see Mr. John's handwriting, to witness him write and sign his name. That is how I became familiar with his signature. From time to time I received minute papers from his office".

Mr. Mottley again sought to tender the document, but the learned Judge remained unmoved. The application to admit the document was refused. The reason given being the same, that "it is not proved to have been signed or written by the defendant".

Undaunted, Mr. Mottley sought to put in some other documents allegedly received by Oliver Phillip from Assistant Superintendent of Police Blanchard. It is not clear what those documents were, but apparently they were directed also at proving the handwriting of Patrick John. His efforts proved equally fruitless, and the benefit of the evidence of the handwriting expert in so far as Patrick John went was lost to the State. Nothing more need be said at this stage other than that it appears to us that the witness Oliver Phillip, from his evidence satisfied all the tests of competence to speak of his knowledge of the handwriting of Patrick John. To what extent it had to be "proved to the satisfaction of the Judge to be genuine" in the terms of Section 19 Cap. 64 remains to be considered.

The efforts of Mr. Mottley to put in evidence a comparative document in the form of a diary purporting to have been written by the accused Malcolm Reid, proved equally unsuccessful. In this respect Gene Pestinna testified:-

"I am an Inspector of Police No. 161 of the Commonwealth of Dominica Police Force..... presently in charge of the Eastern District. On 15 January 1981 I was attached to the special branch. I know the accused Captain

/Walter.....

Walter Reid. He was a member of the Defence Force. Whilst a member of the Police Force I have visited Reid at Defence Force Headquarters on many occasions. On many of those visits I have seen his writing. I know his handwriting very well. I have seen him write. Captain Reid and I are very good friends. I look at this diary..... I did not see Captain Reid write this diary particularly....."

Objection was taken by Mrs. MacCauley at this stage to the production of the diary on the grounds that.

- (1) The Prosecution has not shown the relevance of the diary.
- (2) It has not been produced from proper custody.
- (3) The witness said he had not seen the accused write the particular document.

The legal argument which ensued, resulted in the ruling of the Court in these terms:-

"The Court rules that it is not proved to the satisfaction of the Court that the writing in question, the diary, is proved to the satisfaction of the Court to be that of Malcolm Reid in accordance with Section 19 Cap. 64.

Here again it would seem to us that this witness was hardly any less competent to speak of his knowledge of the handwriting of Malcolm Reid than was Commissioner Oliver Phillip to speak of that of Patrick John.

Section 19 of Cap. 64 states that:

"Comparison of the disputed writing with any writing proved to the satisfaction of the Judge to be genuine shall be permitted to be made by witnesses and such writings and evidence of the witnesses respecting the same may be submitted to the Court and jury as evidence of the genuineness or otherwise of the writing in dispute".

It is identical in terms to Section 8 of the Criminal Procedure Act 1865.

Both Phillip and Pestinna testified that they had respectively seen Patrick John and Malcolm Reid write. Phillip as Commissioner of Police would have worked in close conjunction with Patrick John as Prime Minister and Minister of National Security, and the same relationship would have

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existed between Pestinna as head of the special branch, and Reid the second in command of the Defence Force.

The methods of proof of the handwriting are not only set out in paragraph 1262 of the 39th edition of Archbold but similar provisions are to be found in all the standard works on evidence. A statement that a witness is acquainted with the party's handwriting has more often than not been held to be sufficient in chief, it being for the opponent to cross-examine as to the means and extent of the knowledge.

Doe v Suckermore - 111 E.R. p. 1331 - 5 A & E 703, 730 - 731.

There was no cross-examination of either Phillip or Pestinna on this aspect.

It must be remembered that in the final result, it is the jury who are being invited to make a comparison of the handwriting on the two documents, and the opinion of the expert is merely to assist them. On a proper direction, the trial Judge would still have to direct them that they should be satisfied that the comparative document being put forward is in the handwriting of the accused, before using it as a basis of comparison with the questioned document. The standard which the jury has to apply is the standard applicable to all criminal matters of which they are seized that is, proof beyond a reasonable doubt. Can it be said however that the Judge when called upon to admit the document in accordance with Section 19 of Cap. 64 has got to apply the same standard of proof?

In *R v Angell* (1978) 3 ALL.E.R. 950 - 1979 Cr. App. Rep. 38, it was held that the standard of proof to be applied by a trial Judge in deciding whether pursuant to Section 8 of the Criminal Procedure Act 1965 writing is proved to his (the Judge's) satisfaction to be genuine, is the civil standard of proof that is, the Judge need only be satisfied that the writing is genuine; the matter being covered by the statute, the criminal standard of proof is inapplicable.

/Counsel,.....

Counsel for the respondents had submitted before this Court that the criminal standard was applicable. It was pointed out by Dr. Barnett for the State that the provision is contained in the Evidence Act which is applicable to both civil and criminal proceedings so that the criminal standard of proof could hardly be acceptable. There is much merit in this submission and this Court sees no difficulty in agreeing with and accepting the standard of proof laid down in Angeli's case.

On the question of relevance it is well established that the documents being sought to be tendered for comparative purposes, need not be relevant to the case. (*Birch v Ridgeway* (1858) 1F & F270). The Court is firmly of the view that on the basis of the evidence given by Oliver Phillip and Gene Pestinna and the authorities, the learned trial Judge ought to have admitted in evidence the passport application form purported to have been written up and signed by Patrick John, and the diary purported to have been written up by Malcolm Reid. In this respect therefore, there was a wrongful exclusion of evidence.

Despite this however, the Director of Public Prosecutions cannot maintain an appeal under the amended Act - 16/81 - if either of the two preliminary objections taken, namely, (1) that the appeal does not raise a question of the interpretation or construction of a point of substantive or adjective law relating to the evidence, or (2) that the purported amendment is unconstitutional null and void, is successful. Before dealing with the submission of No-Case the preliminary objections should now therefore be dealt with.

The Preliminary Objections:

There are many statutes which give a right of appeal by way of case stated on the ground that the determination is erroneous in law. It not infrequently happens that Magistrates sometimes come to a decision which no reasonable bench could have come to. In such a case the High Court on an appeal can interfere on a point of law. (*Bracegirdle v Oxford*,

/ (1947).....

(1947) 1 ALL E.R. 126).

If wrong legal principles are applied in making a decision, or in accepting or rejecting evidence, both raise questions of law. There can hardly be any room for dispute when it is said that the wrongful admission and/or the wrongful exclusion of evidence raise questions of law which in a Court of Appeal can lead to the quashing of a conviction. I have already indicated the Court's view that the learned trial Judge wrongfully excluded the passport form and the diary. This wrongful exclusion of evidence in our view raises a point of law and is sufficient to ground the right of appeal of the Director of Public Prosecutions, unless it can otherwise be shown that the amendment is unconstitutional, null and void. The first preliminary objection therefore fails.

Turning now to the second preliminary objection, Section 8(5) of Commonwealth of Dominica Constitution Order 1978 S.I. 1027 of 1978 reads:-

"A person who shows that he has been tried by a competent Court for a criminal offence and either convicted or acquitted shall not again be tried for that offence or for any other criminal offence of which he could have been convicted at the trial save upon the order of a superior Court in the course of appeal or review proceedings relating to the conviction or acquittal".

This provision in the constitution has not in any way enlarged, or abridged the common law right of an accused to avail himself of the pleas of autrefois acquit or convict. The right of an accused person to avail himself of this plea, can be taken away by a Court of Appeal who can order his retrial. Counsel for the respondents submitted that this power to order a retrial, or the exercise of the power, is vested in the Court of Appeal, and not Parliament. Counsel then invited the Court to read Section 37(3) of the amending Act - 16/81 which states:-

/"The Court.....

"The Court of Appeal in such appeal by the Director of Public Prosecutions shall allow the appeal if it thinks the decision was wrong in law and order a retrial and in any other case shall dismiss the appeal".

He submitted that by the use of the words "shall allow the appeal..... and order a retrial", Parliament was there assuming the power and directing the Court of Appeal, thereby taking away from them the exercise of any discretion in the matter. If therefore it was the intention to divest the Court of Appeal of their discretionary power to deprive the accused of his protection of the plea of autrefois acquit, then Section 8(5) of the Constitution should first have been amended in accordance with the special provisions laid down in Section 42(2) thereof. This was not done, therefore the next question which he submitted had to be decided was whether or not Section 37(3) was severable from Section 37(2) which gives the right of appeal. A look at both subsections he submitted shows that they are inextricably bound up with each other, and form a scheme which was intended by the legislature. Any attempt at severance would destroy this scheme and therefore the amendment as a whole should be declared unconstitutional, and as amounting to a usurpation of the judicial power of the Court of Appeal. He referred to the case of *Don Liyanage v The Queen* 1967 A.C. 259.

In response Counsel for the State submitted that Section 8(5) of the Constitution does not contain any implied provision that an order for retrial by the Court of Appeal must have been made in the exercise of an unfettered discretion. On the contrary, the establishment and jurisdiction of the Court of Appeal as well as the powers of the Court are fixed by law, and not by the Constitution. Counsel referred the Court to Section 9(2) of the West Indies States Supreme Court Order 1967 .. S.I. 223 of 1967 which reads:-

"The Court of Appeal shall have in relation to the State such jurisdiction to hear and determine appeals and to exercise such powers as may be conferred upon it by the Constitution or any other law of the State".

/He.....

He submitted that the Don Liyanage case was quite inapplicable to the present circumstances. That involved a special court being set up to deal with special persons, under rather special circumstances, and novel rules of evidence.

In our view, these submissions of Counsel for the appellant are a complete answer to this second preliminary objection. The amended Act 16/81 creates a new right of appeal, and confers upon the Court of Appeal a power to deal with it. Whilst recognizing the necessity to closely scrutinize legislation of this nature, we do not consider the Act unconstitutional, and this point also fails.

There now remains to be considered the ruling on the No-Case submission, and whether or not that raises a question of law. For reasons which will become obvious shortly, we will refrain from commenting or expressing an opinion on the evidence, other than is necessary for the purpose of this decision.

The No-Case Submission

In February 1962, Lord Parker C.J. issued the following practice note:-

"A submission that there is no case to go to a jury may properly be made and upheld:-

- (a) When there has been no evidence to prove an essential element in the alleged offence;
- (b) where the evidence adduced by the prosecution has been so discredited as a result of cross-examination or is so manifestly unreliable that no reasonable tribunal could safely convict on it."

Practice Note - (1962) 1 ALL E.R. p. 448.

In 1977, Lord Widgery in the case of *R v Barker*, (1977) 65 Cr. App. Rep. 287 at 288 said:

"It cannot be too clearly stated that a Judge's obligation to stop the case is an obligation which is concerned primarily with those cases where the necessary minimum evidence to establish the facts of the crime has not been called. It

/is not.....

is not the Judge's job to weigh the evidence, decide who is telling the truth and stop the case merely because he thinks the witness is lying. To do that is to usurp the functions of the jury....."

Counsel for the State, Dr. Barnett, submitted to this Court that the nature of this case and the evidence adduced in support of the charges, were not such as to justify in law the decision of the learned Judge to uphold the submission. The principal witness he submitted was Algernon Maffie. His true character was not hidden, and indeed it was attacked; but whether or not he was telling the truth, was, counsel submitted, essentially a matter for the jury. He did not resile from the fact that Maffie was an accomplice and had an interest to serve, but in these circumstances the Judge's duty to give an accurate and appropriate warning was clear.

He further submitted that the very nature of his character and his close association with the plot made him a natural ally, and his story may thus have appeared credible to the jury. Counsel pointed out that there were many factors emerging from the evidence which tended to give credence to Maffie's account. He specifically mentioned the evidence of Osburg as to the thwarting of the expedition, the declarations made by Perdue and others to Osburg, the remittance of funds from Perdue through the account of Juliar David at the Royal Bank of Canada, the frequent visits of Perdue to Dominica, and the evidence of the meeting in Antigua.

Finally Dr. Barnett submitted that the upholding of the No-Case submission was wrong in law, and as such raised a point of law upon which the Court can pronounce. He relied on *Ross v Rivenoll* (1959) 2 ALL E.R. 376, *Tibbetts v Eldemire* (1975) 13 Jamaica L.R. 241.

In reply counsel for the respondents submitted that not every submission of No-Case can be treated as a point of law. At the highest, the decision here of the learned Judge raises only a question of mixed law and fact, and does not ground the appeal of the Director of Public

/Prosecutions.

Prosecutions. The Court is not in agreement with this. We are of the opinion that a submission of No-Case involves a point of law as was clearly shown in the case of *Ross v Rivenoll* (supra).

Counsel for the respondents referred us to the case of *R v Galbraith* - (1981) 2 ALL E.R. 1060 which set out guidelines to be followed by a trial Judge on a submission of No-Case to answer. This case applied the principle laid down by Lord Widgery in *R v Barker* (supra). If it does nothing else, it appears that the case of *Galbraith* strengthens and reaffirms the directions given by Lord Parker in 1962. Lord Lane C.J. said:-

".....Where the Judge comes to the conclusion that the Crown's evidence, taken at its highest, is such that a jury properly directed could not properly convict on it, it is his duty, on a submission being made, to stop the case. Where however the Crown's evidence is such that its strength or weakness depends on the view to be taken of a witness's reliability, or other matters which are generally speaking within the province of the jury, and where on one possible view of the facts there is evidence on which a jury could properly come to the conclusion that the defendant is guilty, then the Judge should allow the matter to be tried by the jury....."

This statement is very relevant to the circumstances of this case. The reliability of the witness Maffie featured largely in the case. On the basis of the evidence adduced and the authorities, we are of the view the case should have been left to the jury, and that the learned trial Judge erred in that respect.

At the close of Dr. Barnett's submissions, and in answer to the Court, he guardedly admitted that the decision of Mitchell J. to uphold the No-Case submission in respect of the accused Dennis Joseph only, could be justifiable in law. We are entirely in agreement with this. We find that there was no evidence to go to the jury in respect of Joseph. In so far as the other accused Patrick John, Malcolm Reid, and Julian David are concerned, we are of the view that there was evidence against them on which a jury properly directed could convict, and that the learned trial

/Judge.....

Judge was wrong in law in upholding the No-Case submission in respect of these three accused. This too in our opinion raises a point of law sufficient to ground the appeal of the Director of Public Prosecutions.

It follows therefore that the three questions submitted by the Director of Public Prosecutions to this Court for determination must each be answered in the affirmative.

The Court's decision accordingly is as follows:-

- (1) The appeal of the Director of Public Prosecutions in respect of the accused Dennis Joseph is dismissed, and the verdict of acquittal entered in his favour on both counts of the indictment is sustained.
- (2) The appeal of the Director of Public Prosecutions in respect of the accused Patrick John, Malcolm Reid and Julian David is allowed, and the verdicts of acquittal entered against each of them on both counts of the indictments, are set aside.
- (3) That there shall be a re-trial of the accused Patrick John, Malcolm Reid, and Julian David in accordance with Section 37(3) of the amending Act - No. 16 of 1981 upon a fresh indictment.
- (4) That the accused Patrick John, Malcolm Reid, and Julian David should forthwith be retaken into custody, and that they should each thereupon be offered bail in the sum of \$10,000.00, with one or two sureties.

L.L. ROBOTHAM,
Justice of Appeal.

/N.A.....

N.A. BERRIDGE,
Justice of Appeal

N.A. PETERKIN,
Chief Justice.