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SAINT VINCENT & THE GRENADINES

IN THE COURT OF APPEAL

CRIMINAL APPEAL NO. 11 of 1986

BETWEEN:

WINSTON SAMPSON - Appellant

and

THE QUEEN - Respondent

Before: The Honourable Mr. Justice Bishop - Chief Justice (Acting)
The Honourable Mr. Justice Moe
The Honourable Mr. Justice Mitchell (Acting)

Appearances: C. Dougan & K. Bacchus-Gill for Appellant
C. Joseph, D.P.P. for Respondent

1986: July 16,
Dec. 8.

JUDGMENT

BISHOP, C.J. (Acting)

On Friday 21st February 1986, Winston Sampson was convicted and sentenced to death for the murder of Yolande Weekes, at Queen's Drive in this island, on the 27th January 1985.

On the 28th February 1986, Winston Sampson appealed against conviction and sentence on four grounds, one of which was abandoned when the appeal came on for hearing on the 16th July 1986.

After hearing the arguments and submissions of counsel on each side, this Court stated:

> "Because of the course which the arguments in this case have taken, the Court has been invited to consider only whether or not to order a new trial. The reasons for our decision on the question will be reduced into writing and read at a later date. We are unanimous in the view that the Court ought not to order a new trial in the circumstances of this case. The Appeal is allowed, the conviction quashed and the sentence set aside; and lest there be any doubt we direct that there be an acquittal entered."

We now put our reasons in writing.

The need to consider only whether there ought to be an order for a new trial or not arose on the submission of the learned Director of Public Prosecutions after he conceded that there had been a fatal error committed by thelearned trial Judge. Mr. Joseph also conceded that (a) the evidence of Dr. Sunderam was material to the guilt or innocence of

/the accused....

the accused and it was not merely formal (b) a conviction could not have been sustained on the remainder of the evidence, without that of the doctor being put to the Jury (c) an injustice could have resulted to the accused if the trial had continued without the witness being called so that the Jury could see and hear him give evidence and be in a position to decide what if anything, to accept as true.

The case for the Crown was based on circumstantial evidence and before dealing with the procedure which was used and with the decision of the learned trial Judge to admit the doctor's evidence, it is helpful to refer to the following material facts on which the case was based.

On the 26th January 1985 Winston Sampson, the Appellant, drove motor car p 7263 to the house of Lawrence Weekes at Liberty Lodge. There, he was assisted by Garfield Weekes the brother of Yolande Weekes, to unload about a dozen cases of whiskey from the front seat, the back seat and the trunk of the car. Then, in the course of conversation between Garfield Weekes, his sister Yolande and the appellant, the appellant promised to pass at their home around 11.00 p.m. to take them with him to Wheel Beach Bar.

At about 10.40 p.m. Garfield Weekes, Yolande Weekes and Winston Sampson left in car p7263, driven by Sampson, for the Beach Bar. They arrived there at about 11.00 p.m. and spent four hours or so.

Throughout the evening Yolande Weekes was seen by others including her close friend Vanessa Patrick and her male friend Curt St. Jour who admitted that they had been or were still on intimate terms.

The appellant was in the company of Vanessa Patrick and Yolande Weekes for a part of the time that the latter spent there. Yolande Weekes was also in the company of Curt St. Jour, and in his words, "she was dancing on me, holding me, and kissing me."

There was evidence, which, if accepted, showed that the appellant was in a position at the Bar from where he could see Curt St. Jour and Yolande Weekes when they were together.

Around 3.00 a.m. Garfield Weekes told Yoland that it was time to go home. He joined the appellant in car p7263 and he asked him a question which, Garfield considered the appellant answered abruptly and not as he expected the appellant to do.

Yolande Weekes was not ready to go home and so she went to the car where she was heard to tell the appellant 'don't feel', she was getting a

/ride with....

ride with someone else and would be home shortly. Curt St. Jour testified that she was expecting him to take her home. Yolande Weekes returned to the bar and the appellant drove off with Garfield and two female passengers, one of whom supported the opinion evidence of Garfield Weekes that the appellant not only drove fast but also remained silent throughout the journey.

After he dropped the passengers, the appellant drove away in the direction from which he had just come.

Two people saw when Yolande Weekes left the Wheel Beach Bar in the early hours of the morning of the 27th January 1985. Christopher John, a mini-bus driver who reached the Beach Bar around 3.30 a.m., saw Yolande Weekes, whom he knew "since she was going to school", go from the Beach Bar around 3.45 a.m. to a maroon with black streak Toyota motor-car, p7263, which he recognized as a car owned by his good friend Ali Robertson. Christopher John also saw her enter that car, which was driven away. He could not say who the driver was, because the tinted glass of the windows prevented him from seeing inside the car. Indra John, a hairdresser, (unrelated to Christopher John) said she knew Yolande Weekes "from Nursery school" and she saw Yolande around 4.00 a.m. walk towards the gate of the Beach Bar and enter a burgundy and black car owned by Ali Robertson.

Albert (or Ali) Robertson testified that he owned the car p7263 and that he lent it to the appellant over the week-end commencing 26th January 1985. It was not in his (Robertson's) possession either on 26th or 27th January 1985.

The car in question was produced as an exhibit at the trial and it was identified or recognised as the car which Yolande Weekes entered between 3.45 a.m. and 4.00 a.m. on the 27th January 1985.

Leo Gibson who lived at Dorsetshire Hill also recognised the car which was exhibited as the vehicle that he saw at Dorsetshire Hill School gate, after it had been driven very fast from the direction of Dark Hole or Anderson between 4.10 a.m. and 4.20 p.m. on the 27th January 1985. He was unable to say who was driving that car.

About 7.00 a.m. on the 27th January 1985 the body of Yolande Weekes was discovered lying on the road in Anderson, about 500 yards from the area called Dark Hole. Her throat was cut.

What happened between the time that Yolande Weekes was seen to enter the car p7263 and the time that her body was discovered? It was

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clearly vital to the Crown's case that the events in that interval be established to the Jury's satisfaction; and more particularly, the cause of the death of Yolande Weekes was an essential ingredient of which the Jury had to be satisfied so that they felt sure of it before there could be a conviction for murder.

How then did the prosecution seek to satisfy the Jury as to the cause of death? How too did the prosecution seek to assist the Jury with the facts found and the opinions held by the doctor who performed the post-mortem examination?

Dr. Manduri Sunderam, a registered medical practitioner and surgeon at the Kingstown General Hospital gave evidence at the preliminary inquiry before the Magistrate in 1985.

At the trial with which we are here cocerned, after 18 witnesses had given evidence, the learned Director of Public Prosecutions sought to "put in the deposition of Dr. Sunderam" (Judge's note) under sectio 25 of Cap. 5. There was no objection taken, and the learned trial Judge noted: "Evidence of Dr. Sunderam at p.1, admitted in evidence and read to the Jury."

At the hearing of the appeal the learned Director of Public Prosecutions referred to section 25 of the Administration of Justice Ordinance. The relevant part states:

> "(1) In addition to and without prejudice to any other law, it shall be lawful to dispense with the production of a Government Medical Officer or other person as a witness at a criminal trial in the Court, where, in the opinion of the Court, the evidence of such witness is merely formal or is not really material to the guilt or innocence of the accused, or the trial, without injustice to the accused, can proceed without such witness being called.
>
> (2) In such case the Court may allow the deposition of such witness taken at the preliminary enquiry to be read at the trial."

Clearly the application to the learned trial Judge sought to dispense with the production of Dr. Sunderam as a witness at the trial. Clearly too the section required the Court to exercise a judicial discretion. It was, in our view, incumbent upon the trial Judge to determine, within the terms of subsection (1), whether or not the deposition of the doctor should be allowed to be read at the trial. The fact that no objection was taken to the application did not relieve the Judge from his statutory

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duty. In allowing the deposition to be read the learned Judge gave no indication how he arrived at this decision. Did he find it to be merely formal? Did he find that it was not really material to the guilt or innocence of the accused? Did he conclude that the trial could proceed without injustice to Winston Sampson, without calling the doctor? We are unable to say whether all or any of these considerations led to his ruling.

Learned Counsel for the appellant argued the following grounds of appeal, among others:

> "(1) The learned Judge erred in law in admitting into evidence the deposition of Dr. Sunderam, he being a material witness in the case.
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> (2) The learned trial Judge misdirected the Jury by omitting to direct them on the law relating to the admission of depositions, what weight should be attached to them, and by failing to tell them that they should exercise caution in view of the fact that they had not seen the deponent, nor had his evidence been tested by cross-examination before them."

Dr. Sunderam carried out a detailed post-mortem examiation around midday on 27th January 1985. He made a significant number of findings of fact from some of which he formed opinions which were relevant to the case being advanced by the prosecution. For example, the nature of the instrument which could have caused the injuries found on the body; the condition of the victim when her throat was cut, and the time that death occurred. The cause of death was, as was stated earlier, a vital fact on which the Jury had to decide. Dr. Sunderam was the sole witness to provide this information.

After due consideration, the Director of Public Prosecutions conceded that the evidence of the doctor was not merely formal, that the evidence which was contained in the deposition was material to the success of the Crown's case, and, as was pointed out before, that without such evidence a jury could not properly convict the appellant for the murder of Yolande Weekes.

Mr. Dougan submitted that the deposition of Dr. Sunderam was wrongly allowed to be read, the evidence therein was not properly left for the analysis of the jury, and, had it not been considered by them, there would have been no case for Winston Sampson to answer.

The true nature of the application to read

the deposition of the doctor, was further emphasised by a subsequent application in respect of the deposition of the witness Merlin Brachen. Almost immediately after the doctor's deposition was read, Dexter Sutherland, a policeman, gave evidence as a witness for the prosecution. He explained that on the 31st January 1986 he was on duty at the ~~immigration~~ Immigration Department, Arnos Vale Airport. He "checked out Merlin Brachen." He saw her leave as a passenger aboard a LIAT aircraft, flight 335 bound for Trinidad. He carried out a check of subsequent immigration records and he stated that Merlin Brachen had not returned to the territory. Thereupon, the learned Director of Public Prosecutions applied to have her deposition (which was taken before the Magistrate) given in evidence at the trial. Clearly different considerations applied to this request which was made under section 34(1) of the Administration of Justice Ordinance. That section provides, among other thigs, that: "any deposition taken under the provisions of this Ordinance against.....any person accused of an indictable offence may be produced and given in evidence at the trial of the person against.. .....whom it was taken, if it is proved to the satisfaction of the Court (a) that the deponent is absent from the colony.....and (e) that the deposition purports to be signed by the Magistrate by.....whom it purports to have been taken and (f) that it was taken in the presence of the accused person.....and that he, or his counsel or solicitor, had a full opportunity of cross-examining the deponent....."

We have not been invited in this appeal to consider the "admission" of the deposition of Merlin Brachen but we have referred to the application to produce it, in order to demonstrate the exclusiveness of the two applications that were made to the learned trial Judge. The application with respect to the doctor's deposition was governed by different considerations from that with respect to the witness who was out of the island. The learned trial Judge was required to take different factors into account in reaching his decision.

The learned Director of Public Prosecutions did not take serious issue with the second ground of appeal - quite properly so - for the summing up showed that the learned trial Judge did not direct the Jury on the approach which they should adopt when evaluating the evidence in a deposition. He ought to have explained that it must be assessed bearing in mind it was evidence from a witness whom they neither saw nor heard and more particularly whom they did not see cross-examined or have a chance themselves to ask any questions they may have wished to ask. It is very likely indeed that a jury may have required clarification on some of the findings of the doctor; for example "excess guitation of the vascular system with acute hypoxia....." (a phrase recorded in the deposition as being associated with the cause of death).

/The remaining.....

The remaining grounds of appeal on which learned Counsel relied, require no more consideration than to say that we found no merit in them. It was not correct to say that the learned Judge omitted to put the defence adequately. Indeed he explained it on several different occasions in his summing up. Again, while the learned trial Judge may not have analysed each and every inconsistency or discrepancty to be found in the evidence, he directed the Jury clearly on how they should deal with discrepancies which they found and he assisted them with a number of them. The Jury heard the evidence and must be given credit for the capacity to analyse it as reasonable Vincentians.

We turn now to our refusal to grant an order for a new trial.

The learned Director of Public Prosecutions submitted that this Court ought to order a new trial of this case. He relied upon the following reasons; (1) the nature of the evidence in the deposition of the doctor was such as to show that it was factual and (2) defence Counsel had already cross-examined the doctor extensively and the Jury would have had the benefit of the answers given by the doctor. In addition it was Mr. Joseph's contention that the evidence of the doctor could not have been shaken by any cross-examination conducted before the Jury.

In our view none of these reasons, either alone or together with one or both of the others, would justify an order for a new trial.

Mr. Dougan pointed out to the Court that on the 4th November 1985, following a disagreement among the Jury, the learned trial Judge ordered a re-trial; and it was the re-trial which was now on appeal. Learned Counsel for the appellant asked this Court to consider also (a) the tenuous nature of the evidence as a whole and (b) the doctor's whereabouts were unknown. It is fair to state that Mr. Joseph advised the Court that the doctor's whereabouts abroad were known and if a new trial were ordered he would be brought back to give evidence from the witness stand.

This Court was guided in its decision mainly by the judgment of Lord Diplock in REID v R. (1978) W.I.R. 254 - an appeal to the Privy Council by leave of the Court of Appeal of Jamaica. The Court of Appeal allowed an appeal, quashed the conviction and by a majority ordered a new trial on a charge of murder of which the appellant had been convicted by the verdict of a jury. There were four points of law certified as arising for consideration but only one of them is pertinent to the instant appeal, namely, what are the principles which should apply in considering whether or not a new trial ought to be ordered. Section 39(2) of the West Indies Associated States Supreme Court (St. Vincent)Act No. 9 of 1970 confers power on this Court to order a new trial and it is couched in almost

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identical terms to section 14(2) of the Judicature (Appellant Jurisdiction) Act 1962 of Jamaica. Section 39(2) reads thus:

> "Subject to the provisions of this Act the Court shall, if they allow an appeal against conviction, quash the conviction, and direct a judgement and verdict of acquittal to be entered or, if the interests of justice so require, order a new trial."

The Jamaican section 14(2) adds the following words after the word "trial"; "at such time and place as the Court may think fit."

In his judgment, Lord Diplock pointed out that "although the verb used is mandatory: 'the Court SHALL....., if the interests of justice so require, order a new trial', and consideration of what the interests of justice require in a particular case may call for a balancing of a whole variety of factors, some of which will weigh in favour of a new trial and some against, and not all of which are necessarily confined to the interests of the individual accused and the prosecution in the particular case.

The weight to be given to these various factors may differ from case to case and depends very much on local conditions in Jamaica with which the Court of Appeal is much more familiar than their Lordships and is better qualified to assess....."

Lord Diplock went further to indicate that their Lordships would be reluctant to list factors that may be present in particular cases and where they were present, would call for consideration in deciding whether upon the quashing of the conviction the interests of justice required a new trial to be held. He pointed out the danger that would arise if a catalogue of factors were embarked upon and he emphasised that "the recognition of the factors relevant to the particular case and the assessment of their relative importance are matters which call for the exercise of the collective sense of justice and common sense of the members of the Court of Appeal.....who are familiar.....with local conditions."

Nevertheless in order to assist the Court of Appeal of Jamaica with the point of law, their Lordships did mention some of the factors that were very likely to call for consideration in the common run of cases in Jamaica in which that Court had to decide whether or not to exercise its power of ordering a new trial; but Lord Diplock hastened to point out that the factors mentioned did not constitute a closed list to which other factors could not be added.

/In answering.....

In answering the request of the Jamaican Court, Lord Diplock said:

> "It is not in the interests of justice as administered under the common law system of criminal procedure that the prosecution should be given another chance to cure evidential deficiencies in its case against the accused.
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> .....
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> The seriousness or otherwise of the offence must always be a relevant factor; so may its prevalence; and where the previous trial was prolonged and complex, the expense and the length of time for which the court and jury would be involved in a fresh hearing may also be relevant considerations. So too is the consideration that any criminal trial is to some extent an ordeal for the accused, which the accused ought not to be condemned to undergo for a second time through no fault of his own unless the interests of justice require that he should do so. The length of time that will have elapsed between the offence and the new trial if one be ordered may vary in importance from case to case....."

In the instant case there was a re-trial following the failure of the Jury to reach a unanimous verdict one way or the other. In other words the prosecution had failed to prove the case. We have regarded this as a factor to be considered. So too the fact that on the basis of what was said by the learned Director of Public Prosecutions, it seemed that the witness Sunderam could have been called and put before the Jury at the trial - his whereabouts were known. By its application the prosecution wishes to have the opportunity to correct an evidential deficiency, and, through no fault of his own, it is sought to put the accused on trial for the third time - a trial which would at the earliest, commence more than two years after the date of the offence. Finally we took notice of the fact that although there was some evidence that human blood was detected from material in the trunk of the car and from the left rear door and spare wheel, there was evidence that it was not found until almost seven months after the death of Yolande Weekes; and there was absolutely no link established between that blood and the blood of either the deceased or the appellant. The question whether the evidence about blood and blood pigments found was more prejudicial than probative would necessitate an answer, which, as we perceive it, would be that it was more prejudicial than probative.

Considering the factors mentioned in Reids' case along with the others referred to and the fact that the evidence led against the appellant at the trial could not be said to be very strong, we were of the view that not only did the factors relied on by the Director of

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Public Prosecutions fail to justify an order for a new trial but the additional factors were themselves not such as would justify giving the Crown yet another opportunity to put right the short-comings and to cure the deficiencies in its case.

Thus we decided, unanimously, that this was not a case in which to order a new trial.

E.H.A. BISHOP
Chief Justice (Acting

G.C.R. MOE
Justice of Appeal

H.L. MITCHELL
Justice of Appeal (Acting).