

SAINT CHRISTOPHER AND NEVIS

COURT OF APPEAL

CRIM. APP. NOS.6 & 7 of 1996

BETWEEN:

**CLEMENT THOMAS
DAVID WILSON**

Appellants

v

THE QUEEN

Respondent

Before:	The Hon. Mr. C.M.Dennis Byron The Hon. Mr. Satrohan Singh The Hon. Mr. Albert Redhead	Chief Justice [Ag.] Justice of Appeal Justice of Appeal [Ag.]
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Appearances:

Dr. Henry Browne and Miss K. Hughes for first-named appellant

Mr. Hesketh W. Benjamin for second-named appellant

Mrs Joan Joyner DPP for Respondent

1996: October 1, 28.

JUDGMENT

SATROHAN SINGH, J.A.

On February 14, 1996, the appellants were convicted by a Jury before Hylton J of the offence of the murder of Kenneth Herbert, contrary to the Common Law. They were both sentenced to death. The allegation of the prosecution was that in their joint effort at robbing the Ottley's Plantation Inn in St. Kitts, they intentionally killed the night watchman Kenneth Herbert.

The case against the first named appellant rested solely on the caution statement he gave to the police. The case against the second-named appellant rested on oral and written admissions he allegedly

made to the police. At the trial, the judge, at the close of the case for the prosecution, rejected submissions of no case to answer with respect to both appellants. The trial Judge also rejected submissions that the committal by the Magistrate of the appellants after the preliminary enquiry was bad. The trial Judge sustained objections that the deposition taken by the Magistrate of the witness Elwood Benjamin was defective and therefore null and void but allowed the witness to testify under the additional evidence procedure. The appeals of these appellants challenge the validity of the convictions on all of the aforementioned issues suitably worded as grounds of appeal.

During the hearing of the appeals, the appeal of Clement Thomas was allowed and his conviction and sentence quashed upon the Director of Public Prosecutions conceding the appeal. This Court has already given its reasons therefor. This judgment therefore concerns the appeal of the second-named appellant David Wilson.

THE COMMITTAL

During the trial of this matter, the prosecution attempted to call a witness Elwood Benjamin. His evidence was objected to by the defence on the ground that the Magistrate in taking his deposition at the preliminary enquiry did not comply with a certain statutory provision. The depositions were not authenticated by the Magistrate as required by **S56 of Chapter 46 of the Laws of St. Kitts and Nevis**. The Judge upheld the objection. The deposition of Elwood Benjamin was therefore null and void.

Mr. Benjamin for this appellant argued that the Magistrate, in the conduct of the preliminary enquiry, being a creature of statute, having failed to comply with this statutory provision, that the committal of this

appellant was bad and that there was no committal as a matter of law. Counsel for the appellant concedes however, that without the deposition of Elwood Benjamin, there was enough evidence for the Magistrate to commit but contended that such a consideration was irrelevant because the Magistrate being a creature of statute, if he failed to comply with any of the statutory provisions, the entire proceedings were tainted with the illegality.

I do not agree. The law as I understand it is that if from the depositions properly taken, a prima facie case is disclosed, the committal is valid despite the fact of the defective depositions. The fact that the taking of a certain deposition did not comply with the statute cannot without more render the whole committal bad. Supportive of this proposition is the case of **Charles Edgar, George Harry Parr, Peter Pontika, Thomas Andrew Rooney** (1958) 42 CAR 192 where in the English Court of Criminal Appeal it was held that if, upon the depositions which were properly taken a prima facie case was disclosed, the committal was valid. In the instant matter, it is accepted by both sides that from the depositions properly taken a prima case was disclosed. In those circumstances I hold the committal to be valid.

This ground of appeal is without merit.

ADDITIONAL EVIDENCE

Having ruled out the deposition, the Judge then allowed the witness Elwood Benjamin to testify as an additional witness after notice of such procedure was given to the defence by the prosecution. Mr. Benjamin contended before this Court that this was unfair to the appellant and legally wrong the witness having already testified at the

preliminary enquiry. witness whose evidence is relevant to the proceedings, may be called by the prosecution at the trial although he did not Testify before the Magistrate at the preliminary enquiry provided notice of the prosecution's intention to so call that witness and the substance of his evidence is given to the accused or his legal advisors [See **Reg. v. Greenslade (1870) Criminal Law Cases 412**]. A witness who testified before the Magistrate, at the preliminary enquiry could not subsequently be called as an additional witness at the trial, because having testified before the Magistrate there would be no need to adopt the additional witness procedure. But I would venture to say that if such a witness has substantial relevant evidence additional to what he gave before the Magistrate, then, provided the requisite notice of this additional evidence is given, he should be permitted to give that evidence.

The function of committal proceedings is simply a safeguard for the citizen to ensure that he cannot be made to stand trial without a prima facie case being shown. To obtain an order for committal for trial, the prosecution is not obliged to offer every bit of evidence at the preliminary examination but only sufficient to raise a prima facie case against the accused. In general however, evidence which is capable of forming part of the affirmative case for the prosecution should be tendered and heard in the course of that enquiry in order to avoid the cumbersome additional evidence procedure at the trial.

In **R v Epping & Harlow Justices, ex parse Massaro** [1973] 57 Cr. App. Rep. 499 Lord Widgery C.J., in dealing with the function of committal proceedings said at p.501:

"For my part I think it is clear that the function of committal

proceedings is to ensure that no one shall attend this trial unless a prima facie case has been made out. The prosecution have the duty of making out a prima facie case and if they wish...not to call one particular witness even though a very important witness, at the committal proceedings. That in my judgment is a matter within their discretion, and their failure to do so cannot on any basis be said to be a breach of the rules of natural justice."

The learned Chief Justice restated this view in **R v Grays Justices, ex parte Tetley** [1979] 70 Cr. App. Rep. 11 at page 15. Whether additional evidence should be allowed at the trial is one for the exercise by the trial Judge of his judicial discretion. A deliberate, unexplained or inexcusable withholding of material evidence may, in a given case, be reason for the exercise of the Judge's exclusory discretion.

The witness Elwood Benjamin's deposition was not authenticated as required by statute. In the result it was null and void. Consequently the position would be as if Elwood Benjamin was not a witness who gave a deposition before the Magistrate. In my judgment therefore, the depositions having been ruled out, and the requisite notice having been given to the appellant, the Judge was correct when she allowed Elwood Benjamin to testify as an additional witness. This was not a case of any deliberate, unexplained or inexcusable withholding of material evidence. It was simply an inadvertent non compliance by the Magistrate of a statutory.

This ground of appeal fails.

NO CASE TO ANSWER

The case against the appellant David Wilson as earlier mentioned. rested on certain oral and written admissions he made to the police. Mr. Benjamin contends that these admissions were not confessions to Murder but merely to the offence of Stealing or Burglary.

Applying the long established and well-known doctrine of common design, when the statements are examined I cannot agree with this

submission of Mr. Benjamin. The statements disclose that he was present with two others at Ottley's Plantation Inn to rob. Among themselves they had a gun, a knife and a hammer. He was in possession of the knife. He knew when the deceased watchman was struck the fatal blow. He described the sound uttered by the deceased when he was struck. The fatal blow having been delivered he actively participated in stealing the safe from that building. He subsequently handed the police the clothes he said he wore at "Ottleys". He also handed a hammer to the police with these words "This is the hammer that Me, Syl and Clement hit the man with". He also gave the police a bag which he said they had at Ottley's. In this bag was *inter alia* a knife. He acknowledged that he put the hammer and the bag with its contents where the police found them in an abandoned house near to his house. He said he put them there after they came from "Ottleys".

In my considered opinion, these admissions of the appellant established an extremely strong case which satisfied the doctrine of common design and all the elements required for the offence of Murder. This ground also therefore fails.

CONCLUSION

For all these reasons I would order that this appeal do stand dismissed. The conviction and sentence are affirmed.

SATROHAN SINGH
Justice of Appeal

I Concur.

C.M. DENNIS BYRON
Chief Justice (Ag.)

I Concur.

ALBERT REDHEAD
Justice of Appeal (Ag.)