SAINT CHRISTOPHER AND NEWS

IN THE COURT OF APPEAL

CIVIL APPEAL NO. 1 OF 1997

BETWEEN:

THE ATTORNEY GENERAL OF ST. CHRISTOPHER AND NEVIS
THE DIRECTOR OF PUBLIC PROSECUTIONS
THE SUPERINTENDENT OF PRISONS — APPELLANTS

and

DAVID LAWRENCE — RESPONDENT

Before: The Hon. Mr. Satrohan Singh — Justice of Appeal
The Hon. Mr. Albert Redhead — Justice of Appeal
The Hon. Mr. Albert Matthew — Justice of Appeal (Ag.)

Appearances: Mr. Delano Bart, Attorney General, Mr. Dennis Merchant with him for the appellants
Dr. Henry Stogumba Browne, Mr. Thomas Astaphan with him for the respondent

[April 16, 17: May 12, 1997]

Criminal Practice & Procedure - Murder charge - Respondent to be on trial for the third consecutive time on the same indictment - Twice before the jury had disagreed - Whether said indictment should be quashed on ground that respondent had a statutory right not to be put on trial for a third time on the same indictment - Whether there is a prescribed procedure to govern such situations in that Federation - Whether there in fact is a lacuna in the law - Whether it was correct that S.53, Criminal Procedure Act contemplated the application of the practice of the prosecution in England in such a case - Section 65 of the constitution as applied to the facts of the case - The relationship of sections 36 & 37 of the Jury Act to each other and the correct interpretation to be placed on those sections. Appeal allowed. Preliminary Objection - Whether the court has jurisdiction in its civil capacity to hear and decide the matter - Supreme Court Act S.31- Clifford & O'Sullivan (1921) H.L. cited - **Amand v Secretary of State for Home Affairs** (1943) H.L., **Glasford et. al. v Commissioner of Police** unrep. St. Kitts C.A. applied - Whether the decision is appealable in the Court's criminal jurisdiction - Whether the Constitution could be called in aid here. Appeal dismissed for want of jurisdiction.

J U D G M E N T

SINGH J.A.

In 1995, the Respondent David Lawrence went on trial on indictment before the High Court for the Murder of Superintendent of Police Jude Matthew. The jury at that trial disagreed and were discharged by the Judge. In December, 1996 the respondent went on trial again on the name indictment. The jury disagreed for the second time and they were again discharged. In February, 1g97, the respondent for

the third time came up for trial on the said indictment Just before that trial actually commenced, Dr. Henry Browne, of Counsel for the respondent, submitted to that Court that the indictment which was tiled since 1995 should be quashed because the respondent had a statutory right not to be put on trial for a third time on the same indictment.

This oral submission having been made, Mr. Hamilton, Q.C. for the Crown, according to the trial Judge, "complained that the submission should have been made only after the filing of a summons and the presentation of an affidavit". The Judge then invited Counsel for the respondent "to file a Summons with a supporting affidavit". This according to **Smith J** "was to allow what would be a novel point to be better set out and more properly identified".

The respondent then filed a "Notice of Originating Motion" said to have been made under Order 8R3 of the Rules of the Supreme Count It was directed to the civil jurisdiction of the High Court. It named the Attorney General and Superintendent of Prisons of this Federation as the respondents. In his judgment, the Judge expressed the view that the respondent misunderstood what the Court had permitted him to do and that the introduction of the named respondents was ill-advised. Smith J thought that because of Clause 6 of the Supreme Court (Constitutional Redress - Saint Christopher and Nevis) Rules 1968, it would have been proper if the constitutional matters raised by the respondent had been continued in the criminal case rather than to introduce new parties. However, the Judge proceeded with the hearing of the Motion and on March, 13, 1997 made the following findings:

"1. There is no express provision in the laws of Saint Christopher and Nevis to regulate the trial of an accused person who is for the third time up before another jury but has been in trials with a jury on two previous occasions on the same charge and the jury on both of those occasions disagreed.

2. There is however the general provision in section 37 of the Jury Act where an accused person may be tried with a new jury duly empaneled and sworn at the same or next Circuit Court where his previous trial has proven abortive.

3. Section 53 of the Criminal Procedure Act provides that where there is no express provision in the Criminal Procedure Act or any other law all matters of procedure shall be regulated by the law of England and the practice of the Superior Courts of criminal law in England.

4. The practice of the Superior Courts in England in the event of a second jury disagreeing on the trial of a person who was previously before the court and the jury then also disagreeing is that the prosecution formally otters no evidence before a third jury.

5. The term "shall be regulated by the practice of the Superior Courts of criminal law in England" in section 53 of the Criminal Procedure Act means that the practice of the Superior Courts in England will regulate by statute the matters of procedure in the relevant circumstances in the courts in St Christopher and Nevis.

6. The practice of the Superior Courts of criminal law in England in the event of the

second jury disagreeing in a trial would therefore regulate the procedure here in St. Christopher and Nevis, there being no express provision in the law here.

7. The practice in the Superior Courts of criminal law in England will not in St. Christopher and Nevis be merely a discretionary practice as may appear to be the case in England but will be the procedure statutorily provided for the disposition of criminal cases in the position of the jury disagreeing a second time and the accused is for a third time before the Court on the same indictment.

8. The applicant David Lawrence is an accused person who has been tried upon an indictment by a second jury which disagreed as did the jury in his first trial and is now to go before a jury a third time on the same indictment".

The Judge then declared that in relation to the Orders sought by the respondent, "the procedure to be followed for the trial of an accused person before a third jury is what obtains in the Superior Courts of Criminal law in England." The Judge then accepted as that procedure what is set out in the 36th Edition of Archbold Criminal Pleadings Evidence and Practice at Paragraph 590:

> "If a jury cannot agree upon a verdict, the prisoner may be, and generally is, tried upon the indictment by a second jury; in the event of the second jury disagreeing, it is a common practice for the prosecution formally to offer no evidence before a third jury, who will then be directed by the judge to find a verdict of "not guilty"."

The Crown has appealed from this order of the Judge.

THE APPEAL

The issues in the appeal are two fold as I see them.

1. Is there a prescribed procedure in this Federation to regulate the trial of an accused person on an indictment for a third time after two disagreements by a jury.

2. Is the practice of the prosecution in England to offer no evidence at the third trial, a matter of procedure as contemplated by section 53 of the Criminal Procedure Act.

1. **THE PRESCRIBED PROCEDURE:**

The procedure to be adopted by a Court trying an accused person on an indictment at any trial is governed by the provisions of the Criminal Procedure Act, Chapter 20 and the Jury Act, Chapter 38 of the Laws of this Federation. By this procedure, the indictment is presented by the Director of Public Prosecutions. If a none prosequi is entered, the Director of Public Prosecutions so informs the Court and the Accused is discharged. It the Director of Public Prosecutions formally offers no evidence before the jury, the judge directs the jury to find a verdict of "not guilty" and the Accused is discharged. If the indictment is to be proceeded with, the accused is arraigned and his trial proceeds in accordance with the steps laid out in the aforesaid Acts and established case law. This as I understand it is the prescribed procedure for trials on indictment and the same prevails whether it is the first, or any subsequent trial

It there is any lacuna in these provisions then section 53 of the Criminal Procedure Act tells the judge how to proceed. This section reads:

> "All other matters of procedure, not herein nor in any other Act expressly provided for, shall be regulated, as to the admission thereof, by the law of England, and the practice of the Superior Courts of criminal law in England".

It has been strenuously argued by Dr. Browne that there is no provision in the aforementioned laws for a third or subsequent trial, that there is a lacuna in the law and that we should seek the aid of Section 53. In support of his submission, reamed counsel referred to the provisions of section 54 of the Criminal Procedure Act which provides:

> "54. When any trial of an indictment for any felony or misdemeanour is had before a second jury, the Crown and the defendant, respectively, shall be entitled to the same challenges as they were entitled to With respect to the first jury."

Counsel submitted that because this section speaks of a trial before a second jury and that no where else in the Act is mention made of a trial before a third jury, that the Act makes no provision for such a trial. I cannot agree with this submission. In my view, the purpose of this section is merely to establish or clarity the rules as to jury challenges after a first aborted trial. In this context, I would prefer to give the words "second jury" a purposive rather than a literal interpretation and interpret same to mean a jury at any subsequent trial.

Dr. Browne then made reference to Sections 36 and 37 of the Jury Act which provide as follows:

> "36. If, in any proceeding, no verdict is delivered by a jury within four hours after the conclusion of the summing up of the presiding Judge, and the Judge is satisfied that there is no prospect of the jury agreeing, he may discharge them.
>
> 37. Whenever, from any cause, the trial of any proceeding shall prove abortive, the presiding Judge may discharge the jury, and the proceeding may be tried with a new jury, duly impanelled and sworn, either at the same, or, if the Judge so order, at the next Circuit Court in the same Circuit, in the same manner as if the former abortive trial had not taken place."

Learned counsel for the Respondent construed these two provisions and submitted that they bear no relation to each other. His submission is that a trial that ended in disagreement and for which the jury was discharged without a verdict is not an aborted trial I cannot agree with this submission. In my opinion, any trial that ends without a verdict being had is an aborted trial I agree with the submission of the learned Attorney General that these two provisions can be read together and, when that is done, they place no limitation on the amount of trials that may be had on the same indictment. Section 36 gives the judge the power to discharge the jury without

recording a verdict if there is disagreement, and section 37 instructs the judge as to his powers of ordering a new trial when a trial ends without a verdict. In my judgment, these two provisions cannot be interpreted as imposing a limitation on the amount of trials that can be had on one indictment.

My conclusion on this aspect of the submission therefore is that the Criminal Procedure Act and the Jury Act, provide the procedure for a third trial of an accused on the same indictment after two disagreements by a jury. It is accepted that there is no "common practice" in this Federation as obtains in England, for the Director of Public Prosecutions to discontinue an indictment after two disagreements by the jury. Unless therefore, this practice of the prosecution in England can be said to be a maker of the procedure of the Superior Courts of England as contemplated by section 53, the practice cannot by section 53 be made a part of the law of this country. I propose therefore to now consider the effect of this "common practice" of the Prosecution of England on the laws of St. Christopher and Nevis.

2. THE PRACTICE OF THE PROSECUTION IN ENGLAND:

The practice under consideration here is the practice of the Prosecution in England to offer no evidence at the third trial of an indictment after two disagreements by a jury on the same indictment. The submission of Dr. Browne is that there is no such practice in this Federation hence the application for the declaration made by the judge.

Section 65 of the Constitution of St. Christopher and Nevis prescribes the powers of the Director of Public Prosecutions. Among those powers, is the power in the Director of Public Prosecutions to discontinue at any stage before judgment is delivered, any criminal proceedings [section 65(2)(c)]. This is the power presumably, similar to that which, as a matter of practice, is exercised by the Prosecution in England where there is to be a third trial after two disagreements by a jury on the same indictment.

I find great difficulty in accepting the submission made on behalf of the respondent that when the Prosecution in England, as a matter of practice, exercises this power, that such exercise of power is part of the criminal procedure at the trial of an accused person on an indictment as contemplated by S53. I would have though that the exercise of this power was that of the prosecutor and that when the intention to exercise this power was intimated to the Court by the prosecution, the Court would then activate the relevant procedure to be adopted, that is to direct the jury to find a verdict of "not guilty". The exercise of that power activates the prescribed procedure. It is not part of the procedure of the Superior Courts of England.

When **Smith J** made the finding at (4) above that the offering of no evidence before a third jury was a practice of the Superior Courts of England, that was a misconception on his part and an erroneous finding. The practice is not that of the Court but the policy of the prosecution. Section 53 of the Supreme Court Act speaks of

the practice of the Superior Courts not of the policy of the prosecution. There in therefore no legal authority for the importation of this so called practice from England. In the exercise of discretionary powers given to the Director of Public Prosecutions in this Federation by Section 6B(2)(c) of the Constitution, she has the power to offer no evidence and to discontinue an indictment if she is satisfied that such was the demand of the justice of the case. It is therefore solely within her exclusive jurisdiction to decide whether or not she should introduce the practice of discontinuance after two disagreements by the jury. This power in the Director of Public Prosecutions to discontinue is exclusive to her and not subject to the directions or control of any other person or authority [Section 65(6) of the Constitution.

For these reasons we are of the view that Smith J erred when he made the above findings that:

1. There is no express provision in the laws of Saint Christopher and Nevis to regulate the trial of an accused person who is for the third time up before another jury but has been in trials with a jury on two previous occasions on the same charge and the jury on both of those occasions disagreed.

4. The practice of the Superior Courts in England in the event of a second jury disagreeing on the trial of a person who was previously before the court and the jury then also disagreeing is that the prosecution formally otters no evidence before a third jury.

6. The practice of the Superior Courts of criminal law in England in the event of the second jury disagreeing in a trial would therefore regulate the procedure here in St. Christopher and Nevis, there being no express provision in the law here.

7. The practice in the Superior Courts of criminal law in England will not in St. Christopher and Nevis be merely a discretionary practice as may appear to be the case in England but will be the procedure statutorily provided for the disposition of criminal cases in the position of the jury disagreeing a second time and the accused is for a third time before the Court on the same indictment".

Accordingly, we do not agree with the declaration of the Judge, the effect of which is, that in the event of a second jury disagreeing, that the Director of Public Prosecutions is bound as a matter of law to formally offer no evidence before the third jury. We do not consider that to be the practice of the Superior Courts of England. We consider it to be a policy decision of the prosecution in England. In our judgment, that power to discontinue in the Director of Public Prosecutions remains discretionary in her as contemplated by section 65(2)(c) of the Constitution to be properly exercised exclusively by her as she sees tit. At this stage therefore, we should allow this appeal and set aside the judgment of the trial judge, it being a wrong judgment which should not be followed. However, before we can do this, we have to enquire and determine whether or not we have jurisdiction do so, our jurisdiction having been questioned in a preliminary objection taken by learned counsel for the respondent. I will therefore now

examine the preliminary objection.

THE PRELIMINARY OBJECTION

At the commencement of the hearing of this appeal, Dr. Browne for the respondent, as a preliminary issue, objected to the hearing of the appeal on the ground that there is no right of appeal by the appellants from the judge's decision. Learned Counsel submitted that the Court is denied jurisdiction by section 31 of the West Indies Associated States Supreme (Saint Christopher, Nevis and Anguilla) Act No. 17 of 1975 (the Supreme Court Act) which deals with appeals from the High Court in civil matters. Section 31(3) provides that:

> "No appeal shall lie under this Section -
> (a) from any order made in any criminal cause or matter."

Counsel further submitted that the Crown also has no right of appeal in any matter that is criminal in nature.

The centre of gravity of this preliminary objection, is whether the judge's decision is an order made in a criminal cause or matter. The principles which govern the question whether an order was made in a criminal cause or matter are more or less settled. These principles were authoritatively stated in decisions of the House of Lords in **Clifford and O'Sullivan (1921) 2 A.C. 570 and Amand v. Secretary of State for Home Affairs (1943) A.C. 147**, and summarized by this Court in a judgment delivered by Sir Vincent Floissac C.J. (as he then was) on January 8, 1995 **in Glasford et al. v. Commissioner of Police, Civil Appeal No.8 of 1994** St. Kitts where the reamed Chief Justice stated:-

> "According to these decisions, there appear to be three preconditions of an order made in a criminal cause or matter. The first precondition is that at the time of the filing or hearing of the application on which the order have been preferred against the applicant or some other person. The second precondition is that the application involved consideration of that charge of crime. The third precondition is that the direct outcome or result of the application was or might have been the applicant's or other person's trial and possible conviction and punishment by a Court or judicial tribunal having or claiming jurisdiction to try, convict and push for that crime."

In Ex parte **Woodhall (1888) 20 Q.B.D. 832**, Lord Esher, addressing the same concept noted that the result of all the decided cases was to show that the words "criminal cause or matter" should receive the widest possible interpretation, the intention being that no appeal should lie in any "criminal matter" in the widest sense of the term, since the Court was constituted for the 'hearing of civil appeals'. In Amand's case, **Viscount Simon L.C. (at p.385)** suggested the nature and character of the proceeding as a relevant test. Lord Wright (at p.388) gave the opinion:

> "The principle which I deduce from the authorities

> which I have cited and other relevant authorities which I have considered is that, if the cause or matter is one which, if carried to its conclusion, may result in the conviction of the person charged and in a sentence of some punishment, such as imprisonment or fine, it is a criminal cause or matter. The person charged is thus put in jeopardy. Every order made in such a cause or matter by an English court, is an order in a criminal cause or matter, even though the order, taken by itself, is neutral in character and might equally have been made of a cause or matter which is not criminal."

The legal position as I understand it from the above learning is that the words "in any criminal cause or matter" should receive a wide construction and that a distinction had to be drawn between the proceedings in which the order under appeal was made and the underlying proceedings to which the relief sought by the applicant would apply if granted; and it was to the latter proceedings that the test ought to be applied.

In the instant matter the underlying proceeding was the aforementioned Indictment. As a result of the continued existence of this indictment, the Respondent was in jeopardy of being tried for a third time for the criminal offence of the Murder of Jude Matthew. This was a crime punishable by death. The motion before the judge involved a consideration of that charge in order to determine whether or not he should be made to undergo a third trial. The direct outcome or result of the motion, could have been the respondent's trial and possible conviction and punishment. Given these circumstances, I am clearly of the opinion that what took place before **Smith J** was a proceeding, the subject matter of which was criminal. In a rather tepid argument before this Court, the learned Attorney General submitted that the word "Order" in section 31(3) does not include a declaration. I do not agree. Section 2 of the said Supreme Court Act defines order as including a "decision and rule". It is my view that this definition would encompass the declaration as made by the judge.

I therefore hold, that unless the Constitution otherwise prescribes, (1) this appeal is caught by the provisions of **section 31 (3)(a)** of the Supreme Court Act and is not maintainable in the civil jurisdiction of this Court and (2) the decision of the Judge is also appealable in this Court's Criminal jurisdiction. By section 38 of the Supreme Court Act (supra), this court could only hear appeals in a criminal matter after conviction and the right of appeal is restricted to the person convicted. The Crown has no right of appeal. I would therefore now examine the Constitution.

THE CONSTITUTION

Section 98 of the St. Christopher and Nevis Constitution Order 1983 [the Constitution] provides as follows:

> "Subject to section 36, an appeal shall lie from decisions of the High Court to the Court of Appeal as of right in the following cases -

(a) final decisions in any civil or criminal proceedings that involve a question as to the interpretation of the Constitution.

(b) final decisions given in the exercise of the jurisdiction conferred on the High Court by section 18 (which relates to the enforcement of the fundamental rights and freedoms); .....

(c) …….

(d) …….

By this law, a right appeal exists in an aggrieved party from final decisions given by the High Court in matters involving the interpretation of the Constitution be they civil or criminal and final decisions given by the High Court in the exercise of jurisdiction conferred upon it by Section 18 of the Constitution. Section 18 of the Constitution gives original jurisdiction to the High Court to hear and determine applications made by any person who alleges that any of the provisions of sections 3 to 17 (inclusive) of the Constitution has been is being or is likely to be contravened in relation to him The neat point to be decided here is whether **Smith J.** when he heard this motion, gave a final decision in a matter involving the interpretation of the Constitution or a final decision in the exercise of jurisdiction conferred on him by section 18 of the Constitution and whether this appeal was brought to challenge such a decision.

It is doubtful whether or not the order appealed from can be said to be a final decision. It is a mere declaration made in relation to a pending indictment as to what, in the opinion of **Smith J.** the law is when a person is to be tried for a third time on an indictment after two disagreements by the jury at two previous trials. What is clear is that the order is not a declaration made under any provisions of the Constitution or to interpret the Constitution. The fact that the title of the motion referred to sections 3(a), 7 and 15(2) of the Constitution and that the respondent asked for an alternative declaration that "to put the Applicant on trial for a third time after two successive Juries have tailed to agree upon a verdict thus resulting in their discharge respectively, would infringe his fundamental rights as guaranteed under Section 3(a), 7 and 15(2) of the Constitution of St Christopher and Nevis 1983" is of no assistance to the appellants in their quest for a right of appeal, this alternative issue not having been ventilated before, or adjudicated upon, by the judge.

In short the judge in determining the motion did not clothe himself with any jurisdiction as prescribed by section 18 of the Constitution and was not in any way interpreting the Constitution. The history leading up to the written application shows that it was never the intendment of either the judge, the appellant or the respondents that the mater should be dealt with as a constitutional matter. And, despite the form of the application and the Constitutional references therein, the issue dead with by both parties and adjudicated on by the Judge bore no reference to the Constitution. I would

therefore hold that the appellants have no right of appeal under section 98 of the Constitution.

The learned Attorney General further submitted that the provisions of section 65(6) of the Constitution afforded the Director of Public Prosecutions a right of appeal in matters of a criminal nature. This provision reads:

> (5) "For the purposes of this section, any appeal from a judgment in criminal proceedings before any court or any case stated or question of law reserved for the purpose of any such proceedings, to any other court (including Her Majesty in Council) shall be deemed to be part of those proceedings:
>
> Provided that the power conferred on the Director of Public Prosecutions by subsection (2)(c) shall not be exercised in relation to any appeal by a person convicted in any criminal proceedings or to any case stated or question of law reserved at the instance of such a person".

It is my considered opinion that this provision of the Constitution does not give to the Director of Public Prosecutions a right of appeal in criminal matters. If the framers of the Constitution meant to give such a power to the Director of Public Prosecutions they would have said so in no uncertain terms and not in language that leaves it open to surmise. The question therefore is what power is given to the Director of Public Prosecutions by section 65(5).

As earlier mentioned no one has a right of appeal in a criminal maker except a convicted person. Because of this, the "proceedings" referred to in section 65(5) could only mean "proceedings" in an appeal brought by a convicted person as a result of a conviction obtained in a criminal maker of a private nature. In such a case the Director of Public Prosecutions pursuant to powers given her by section 65(2)(b) Could take over and continue those criminal proceedings at the appeal stage but only in the role of the respondent to that appeal.

For all these reasons the preliminary objection of Dr. Browne must be sustained. The result of this appeal must, therefore, be that the jurisdictional point is valid. I would accordingly dismiss this appeal for want of jurisdiction. However, before leaving this matter, like the judges of the Court of Appeal of Guyana **in Zaman Alli v. Director of Public Prosecutions (1991) 46 WIR 197**, I am constrained to express my grave disquiet at the absence of a right of appeal from decisions of the High Court which fall under section 31(3(a) of the Supreme Court Act. Because of the present state of the law, however grave and obvious the error of the Judge of the High Court the aggrieved party can have no redress. The instant matter is a glaring example of the inconvenience of this legislation. Section 65 of the Constitution has now been judicially stained with injudicious ink and we are jurisdictionally powerless to have that stain "tippexed". Glasford (supra) was another example. This was lazy legislation which should as a matter of urgency, be suitably amended. Its origin can be traced to similar legislation in England. But, in that country, the aggrieved party is not faced with this inconvenience of impotence, because of a right given by Section 1 of the

Administration of Justice Act 1960, which allows for an appeal with leave directly to the House of Lords from a decision of the Divisional Court in a criminal cause or matter.

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SATROHAN SINGH
Justice of Appeal

I concur ……
ALBERT REDHEAD
Justice of Appeal

I concur ……
ALBERT MATTHEW
Justice of Appeal (Ag.)