

SAINT LUCIA

IN THE COURT OF APPEAL

HCRAP 2003/004

BETWEEN:

[1] FRANCIS PHILLIP  
[2] KIM JOHN

Appellants

and

THE QUEEN

Respondent

Before:

The Hon. Sir Brian Alleyne, SC  
The Hon. Denys Barrow, SC  
The Hon. Hugh A. Rawlins

Chief Justice [Ag.]  
Justice of Appeal  
Justice of Appeal

Appearances:

Mr. Shawn Innocent for the Appellants  
Mrs. Victoria Charles-Clarke, Director of Public Prosecutions for the Respondent

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2007: October 31;  
2009: July 7.

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JUDGMENT

Background

[1] **ALLEYNE, C.J. [AG.]:** This is a judgment of the Court. On 2<sup>nd</sup> May 2007 the Judicial Committee of the Privy Council delivered its reasons for decision in this matter, concluded that in the circumstances the conviction of the appellants for murder cannot stand, and ordered that the appeals be allowed and the matter be remitted to the Court of Appeal, which should be invited to quash the convictions and sentences. Their Lordships also directed that the Court of Appeal may also deal with any

application for a retrial which may be made, the appellants remaining in custody meanwhile.

[2] In their written submissions counsel for the appellants recognized that the Court of Appeal does not have the statutory power to quash the convictions and substitute a verdict of guilty but insane, nor would such a decision be consonant with the directions of the Privy Council.

[3] Paradoxically, however, counsel for the appellants, in the very written submissions, submitted 'that the Court should make an order under section 36(4) (of the **Eastern Caribbean Supreme Court Act**<sup>1</sup>) quashing the sentences and substituting an order under section 1020 of the **Criminal Code of Saint Lucia 1992**.

[3] Likewise, in their written submissions, counsel for the respondent submitted that "given the remittal, the Court of Appeal is empowered to quash the convictions and sentences .... and if it sees fit may substitute a special verdict under section 36(4) of the Eastern Caribbean Supreme Court Act (St. Lucia)".

Section 36 (4) provides:

"Where on any appeal it appears to the Court of Appeal that the proper verdict would have been a special verdict under section 1020 of the Criminal Code the Court of Appeal may quash the sentence passed at the trial and order the appellant to be kept in custody as a prisoner of unsound mind under provisions of the said Code in the same manner as if a special verdict had been found by the jury under that Code."

[4] Counsel for the respondent submitted that the judgment of the Privy Council allowed for three alternative options:

- (i) substitute a special verdict of guilty but insane;
- (ii) uphold the convictions but vary the sentences;
- (iii) order a retrial.

Learned counsel however rightly conceded that the Court of Appeal is not the appropriate tribunal for determining contested issues of fact, and thus the issue of the mental state of the appellants at the relevant time, which is the central and crucial

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<sup>1</sup> Chap. 2.01, Revised Laws of Saint Lucia 2001

issue in this case, based on the conflicting evidence of Dr. Mahy and Professors Eastman and Chevannes, is not amenable to determination by this Court.

- [5] Despite that concession, and conceding that the Court has the power, as indicated by their Lordships of the Privy Council, to order a retrial, learned counsel submitted at the hearing of the matter that this court “may safely restore the convictions and vary the sentences to one of life imprisonment”.
- [6] Notwithstanding that that suggestion has the attraction of avoiding a retrial, and the suggested sentence may well be the most severe that a Court could impose in the circumstances, in light of the decision in the landmark case of **Pratt and Morgan v A.G. of Jamaica & another**<sup>2</sup> to follow that course would fly in the face of the decision of the Privy Council, which ‘invites’ us to quash the convictions and sentences, and opens the way for an order for retrial.
- [7] Unlike in the case of civil litigation, where disputes can be resolved at any stage on the basis of agreement between the parties, criminal litigation is not generally amenable to consent orders in the same way. It is necessary for us to determine the issues in accordance with the directions of the Privy Council.

### **Conclusion**

- [8] This is a very serious case indeed, a case in which the public interest would not be served unless we make an order for a retrial. I would accordingly direct that the convictions and sentences be quashed and that the application by the Director of Public Prosecutions for an order for a retrial be granted in respect of both appellants. The appellants are to remain in custody at the Bordelais Correctional Facility pending the retrial.

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<sup>2</sup> Privy Council Appeal No. 16 of 2003