THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
FEDERATION OF SAINT CHRISTOPHER AND NEVIS
ST. CHRISTOPHER CIRCUIT
(CRIMINAL)
A.D 2009

SKBHCR 2004/0053

THE DIRECTOR OF PUBLIC PROSECUTIONS

v

CALVESTER HERBERT

PATRICK WEEKES

Appearances:

Director of Public Prosecutions, Mrs Pauline Hendrickson, Mr. Reynold Benjamin and Ms Rhonda Nisbett Browne for the Prosecution.

Dr Henry Browne, and Mr Hesketh Benjamin for the Defendants

2009: June, 16th July

DECISION

[1] **BELLE J.** The background to this case is that the Defendants were arrested and charged with the murder of Gerard Saddler on 7th September 2003 and were committed to stand trial for murder and attempted murder by Her Worship Mrs. Josephine Mallalieu-Webbe on 13th February 2004. The Defendants were subsequently indicted by the Director of Public Prosecutions on three counts firstly for the murder of Gerald Sadler and secondly for the attempted murder of Glen Liburd. The third count was possession of a firearm contrary to section 24 of the Firearms Act No.23 of 1967 of the Federation. The first trial of the Defendants resulted in the jury

being discharged by the Learned Trial Judge on 9th of March 2005 because the jury was unable to return either a unanimous or a majority verdict. The second trial commenced on 5th July 2005 and the Defendants were found guilty by way of a majority verdict of the jury on 8th July 2005.

[2] The Defendants appealed against their convictions and sentences, which were handed down on 29th of July 2005. Calvester Herbert was sentenced to thirty five (35) years for murder, five (5) years for attempted murder and fourteen (14) years for possession of a firearm with intent to endanger life. The Second Defendant Patrick Weeks appealed against his sentence of life imprisonment for murder imposed on the same date as that of the first Defendant.

[3] The Appeals were heard and allowed by the Court of Appeal on 28th of October 2008. The Court of Appeal decided to set aside the convictions and sentences and ordered a retrial of both Defendants on an expedited basis. It was common ground at the hearing of this matter that the Court of Appeal was acting pursuant to its powers under section 39 (2) of the Eastern Caribbean Supreme Court (St. Christopher, Nevis and Anguilla) Act; 1975-17 (The Supreme Court Act) which states :

> **"Subject to the provisions of this Act the Court of Appeal shall, if it allows the appeal against conviction, either quash the conviction and direct a judgment and verdict of acquittal to be added or, or if the interests of justice so require, order a new trial."**

[4] I conducted the third trial of this matter and in that trial once again the jury was unable to arrive at either a unanimous or an acceptable majority verdict.

[5] In the Federation of St Kitts and Nevis The National Assembly found it fit to amend the Jury Act by creating a section 37A pursuant to the Law Reform (Miscellaneous Provisions) Act, No. 10 of 1998 in the following terms:

> ***"In any proceedings where the jury fails to agree and there is a second trial in the same case and no verdict is delivered by the jury within four hours after the conclusion of the summing-up of the presiding judge at the second trial then the judge, if he is satisfied that there is no prospect of the jury agreeing, shall enter a verdict, except that he shall give reasons for the verdict entered by him."***

[6] It is common ground between the parties that this trial although the third in number can be seen as the second trial in the sense that the trial is a retrial of the second trial as ordered by the Court of Appeal. It is also common ground that all of the other criteria of the section have been met to trigger the court's jurisdiction to "enter a verdict" pursuant to section 37A.

[7] Counsel also agreed that there was no need for the court to hear further submissions on issues of law or fact relevant to the determination of guilt or innocence. The Director of Public Prosecutions (DPP) even suggested that I should treat the closing addresses as if they had been made to me, and that to hear further submissions on issues of law of fact or both would effectively give the court an advantage as a Trier of fact over the jury. In giving the verdict according to the DPP I must be in no better position than the jury. However I am required to give reasons, which is not a requirement of the Jury.

[8] The DPP further submitted that there was no indication in the legislation as to how far the duty to provide reasons extends- whether it is sufficient to merely say that I entertain no reasonable doubt as the Defendant's guilt, or whether I must explain and resolve every issue of fact relevant to the determination of guilt or innocence. I agree with the DPP that I am not obliged to deal with every issue of fact which falls to be determined but only issues which make me feel sure of the defendants' guilt if I am so inclined.

[9] I would summarize that I can only assume that in the absence of evidence to the contrary the jury considered only issues of fact, which fell to be decided, based on the evidence and issues of law explained in my summation and directions on the law.

[10] At this point I would also introduce the concept of proportionality. That is to say, the question arises as to whether I should be influenced by the number of jurors who voted "guilty" compared to the number who voted "not guilty." But in doing so, again I am challenged with lack of evidence as to the division of the jury on the issue of guilt or innocence. Neither is there any evidence that the Jury was under threat or bribed or pressured in some way to return the kinds of results, which it has in all three trials. However the fact is that there was never a unanimous guilty verdict in any of the trials.

[11] I have to accept that there was some doubt in favour of the accused in all three trials and that that doubt arose from the quality of the prosecution's evidence being based on witnesses who contradicted each other and may have diminished the weight of the circumstantial evidence in favour of the doctrine of joint enterprise. The evidence connected to the time line also caused difficulty for the prosecution since the eyewitness to the actual shooting implied that the shooting took place some time after 9 p.m. while others would have said that it took place some time earlier.

[12] I would have said to the jury that doubts, which arise, are to be resolved in favour of the Defendants. As to the issue of joint enterprise two issues arose. Firstly, apart from Calvester Herbert himself who said in his statement to the police that he was driving the vehicle when the shooting took place, the evidence placing the Patrick Weeks in the vehicle is not clear-cut because of the contradiction of a prosecution witness who said he was at home at 9 p.m. The problems with the evidence against Patrick Weeks also create difficulty with the theory of joint enterprise. Such doubt would be resolved in favour of the defendant Calvester Herbert.

[13] I therefore turn to the theory of the criminal law for greater assistance in resolving those issues. The first issue I would raise is that of the separation of roles in the criminal trial process. This is done to achieve fairness. The judge is ordinarily concerned with directing the Jury on the law and if there is a guilty verdict sentencing the person convicted. In being responsible for the verdict the trial Judge runs the risk of convicting not because of the weight of the evidence but because of the seriousness of the crime.

[14] Another issue to consider is the maxim that that it is better to allow a guilty man to go free than to allow an innocent man to be sent to prison or even suffer death which would be possible in this case. I therefore face serious danger in declaring a verdict even though there are doubts surrounding the evidence. The jury system allows a defendant who may be guilty to go free if there is reasonable doubt. The Magistrate trying a criminal case without a Jury must also acquit if there is reasonable doubt.

[15] However I do not find it prudent to decide this case on the issue of reasonable doubt. Personally I am not in doubt about the guilt of Calvester Herbert and Patrick Weeks.

Calvester Herbert based on the evidence at the very least would have become an accessory after the fact if he knew who had committed the murder, did not report it to the police and indeed sped away from the scene of the crime with the murderer in his vehicle thus helping to secure the murderer's escape. But he was not charged as an accessory.

[16] The issue that bothers me at this time is that of fairness. The Defendants were brought to court to stand trial before judge and jury. Counsel would have conducted their defence cognizant of this fact. They may have taken a totally different approach to the trial had they anticipated that the verdict would fall to be decided by the judge.

[17] Things would have been said and done in the absence of the jury and in the presence of the judge which may have taken a totally different course were it anticipated that the judge would have been delivering the verdict. Their advice to the their client prior to arrest and after arrest if given would have been different. Indeed the entire process would have taken a different shape.

[18] The Constitution of the Federation of Saint Christopher and Nevis provides in Section 10:

> (1) " If any person charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.
>
> (2) Every person who is charged with a criminal offence:
>
> (a) Shall be presumed to be innocent until he is proved or has pleaded guilty.
>
> (b) Shall be informed as soon as reasonably practicable, in a language that he understands and in detail, of the nature of the charged.
>
> (c) Shall be given adequate time and facilities for the preparation of his defence.
>
> (d) Shall be permitted to defend himself before the court in person or, at his own expense, by his legal practitioner of his own choice.

(e) Shall be afforded facilities to examine in person or by his legal representative, the witnesses called by the prosecution before the court, and to obtain the attendance and carry out the examination of witnesses to testify on his behalf before the court on the same conditions as those applying to witnesses called by the prosecution.

(f) Shall be permitted to have without payment the assistance of an Interpreter if he cannot understand the language used at the trial."

[19] I glean from this section of the Constitution that the Defendant in a criminal case is to have a fair trial and the process begins with informing him of the offence charged. At that point it would be presumed and would later become clear at a preliminary inquiry that certain evidence exists which supports the charge, which is sufficient to cause the Magistrate to Commit the Defendant for trial in the High Court.

[20] No doubt it will be argued that the Constitution does not guarantee a trial by jury and in the Magistrate's court there is no jury. But the defendant going into a trial in the Magistrate's court accepts that there is no jury. The defendant appearing in the High Court expects to have a jury. His counsel would prepare his defence on the basis of a jury trial not a trial by judge alone.

[21] In R **v H.,** 90 Cr. App. R 440 (reported in **Archbold 1993 Vol 1** page 1/581, the English Court of Appeal had to deal with a situation in which the appellant has been convicted of six sexual offences against two children. He had previously been tried and acquitted, either by the jury or by the direction of the judge, of various sexual offences in relation to one of the two children. At an earlier trial the jury had disagreed on the remaining counts, which were the counts upon which he was convicted at the second trial. On appeal it was argued that the trial judge should have permitted the defence to introduce the fact of the acquittals at the first trial. It was accepted by the defence at all stages that had that been done it would have been proper for the second jury also to know of the disagreements on the remaining counts. The Court said that the acquittals in relation to one child did not show that the first jury thought that she was lying: had they done so, there would have been acquittals not disagreements on the remaining counts concerning her. There were a number of reasons, which might have activated

the jury to acquit on certain counts, quite apart from a belief that the child was lying and unreliable.

[22] Giving the judgment of the court, Lord Lane C.J. said that in a case such as this, the judge had to balance the interests of the defendant and of the prosecution and he had to determine, in the light of those considerations, what in his judgment would be fair. Fairness rather than any remote, abstruse legal principle was the matter, which had to actuate a judge's reasoning. Coupled with fairness, if not part of it, was the necessity for the judge to ensure that the jury whom he was assisting did not have their minds clouded by issues, which were not the true issues they had to determine. The danger here was that the jury would have been spending their time not in determining what they believed to be true from the evidence they had heard, but that they would be deflected from that course by consideration of what actually actuated the first jury to reach the conclusions it did.

[23] I am moved to arrive at a similar conclusion in the consideration of a verdict in this case. I have to ask the question whether the evidence would have been dealt with in the same way had it been anticipated that the verdict would be delivered by the judge and not the jury. I would presume that the admissions of Calvester Herbert would have been handled differently. I would not have seen an unedited version of Herbert's caution statement if the issue of fact as to who was in the car, was to be left for me to determine. I am aware of the previous trials and the nature of the verdicts. I am also aware of the Court of Appeal's reasons for ordering a retrial of the case. It would be presumed that the jury would not be aware of a number of these issues. How then is counsel to prepare for trial in the circumstances?

[24] I must conclude that section 37A of the Jury Act cannot in light of the requirement of a fair trial be interpreted to mean that a verdict must be delivered by a judge in every instance where the required circumstances arise. I have to read the section as incorporating the constitutional and general common law requirement of fairness. In that regard the statutory "shall" in section 37A of the Jury act should be interpreted as being directory rather than mandatory.

[25] I do believe that there may be cases in which the surrounding circumstances would deem it fair for a judge to enter a verdict. For example if there was clear evidence that the defendant raised no issues in his defence but relied entirely on jury intimidation then I would think it fair to substitute a judge's verdict for a jury's failure to arrive at a verdict. There is no evidence of jury intimidation nor tampering in this case. I note however that one of the things that may have influenced some jurors is the saga relating to the tampering with evidence in police custody. Even though it was stated that the ballistics evidence had not been tampered with, it of course would be open to a juror to doubt this evidence. The impact of this evidence on a judge may be different.

[26] In the final analysis I cannot accept that I am required to enter a verdict in the peculiar circumstances of this case. I therefore decline to do so and instead impose a stay of proceedings in light of the fact that the DPP has said that a retrial is not advisable. I would await the DPP's decision on the issue of an application to lift the stay and attempt a retrial or enter a nolle prosequi and /or the Defence's possible application for dismissal for want of prosecution if no further prosecution is to be attempted.

Francis H V Belle

High Court Judge